

Recent Developments in the Law

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In order to keep you abreast of the recent developments in the law, we are reporting the substance of several current decisions of major import in the jurisdictions of Maryland, the District of Columbia, and Virginia

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MARYLAND COURT OF APPEALS

Contracts -- *Messing v. Bank of America, N.A.* -- 2003 WL 1793353 (April 7, 2003).

An individual who was not a member of Bank of America attempted to cash a check at one of its branches. Bank of America had a practice of requiring non-account check holders to provide an inkless thumbprint signature on the check before it would honor a check. The individual who had already provided his license and a credit card when asked for proper identification refused to give the Bank a thumbprint signature and initiated a complaint for declaratory judgment. The individual alleged that by printing information on the back of the check, the bank had accepted it, and having accepted it was liable for conversion. In his complaint, the individual requested a declaration that the bank's practice of requiring a thumbprint before honoring a check was illegal and an order requiring that such practice be ceased in Maryland. The Circuit Court entered summary judgment for the bank.

The Maryland Court of that the County should pay the full amount of the unpaid judgment, plus attorneys' fees and accrued interest to her. The Maryland Court of Appeals found that Ziegler's attack upon Wolfe was not covered by the Appeals affirmed the lower court's decision finding that the bank had no duty to cash a non-customer's check. It stated that computer printed information on the back of the check did not amount by itself to an acceptance and therefore the bank did not convert the check or its proceeds. Furthermore, the bank's requirement of a thumbprint placed on a check presented by a non-customer was reasonable and its refusal to accept a check without a thumbprint was not a dishonor.

Insurance Coverage -- *Wolfe v. Anne Arundel County* -- 2003 WL 1818146 (April 8, 2003).

Erin Wolfe was raped by police officer Michael D. Zeigler in 1990. She brought a civil rights claim against Wolfe and received a \$1.15 million jury verdict in her favor. The award was for compensatory and punitive damages. Ziegler sought indemnification from the Anne Arundel County Self-Insurance Fund Committee which exists to provide a legal defense in tort suits against county employees based on "acts or omissions committed by [employees] within the scope of employment with the local government." The Committee denied Ziegler indemnification.

Unable to satisfy the judgment against Zeigler, Wolfe filed an action against Anne Arundel County. Wolfe asserted that the County was contractually required to indemnify Ziegler and Anne Arundel County self-insurance program. In coming to such a conclusion, the Court stated that Wolfe failed to demonstrate that Ziegler's offending conduct occurred within the scope of his employment or under the express or implied authorization of his supervisors. Because Ziegler's conduct arose outside of his scope of employment, the Committee's insurance policy was not applicable.

Workers' Compensation -- *Podgurski v. OneBeacon Insurance Co.* -- 2003 WL 1860857 (April 10, 2003).

An employee suffered severe injuries when, in the performance of her normal duties, she slipped and fell on water leaking from defective plumbing on the premises. The employee brought a workers' compensation claim against her employer, Hairstyle Management Systems ("HMS"), and a third party claim against the building owner, Montgomery Ward & Co. General Accident Insurance Company of America ("General Accident") provided the workers' compensation coverage for HMS and awarded the employee \$11,705.51. General Accident claimed a subrogation interest in any amount the employee recovered from Montgomery Ward. Shortly thereafter, OneBeacon Insurance Company ("OneBeacon") succeeded to General Accident's subrogation interests.

A binding arbitration award was issued in favor of the employee on her third party claim against Montgomery Ward in the amount of \$90,000. However, prior to arbitration Montgomery Ward had filed for protection under Chapter 7 of the U.S. Bankruptcy Code. Because of this, the employee received only a fraction of her arbitration award - \$26,589.21, or 29.54% of the original amount. OneBeacon, still seeking subrogation, argued that it was entitled to recover the entire amount it awarded the employee in her workers' compensation. The employee argued that OneBeacon was only entitled to 29.54% of the original amount awarded for workers compensation.

The Maryland Court of Appeals upheld the Circuit Court's decision that awarded OneBeacon full recovery on the original amount it awarded the employee on her workers compensation claim. It held that under the Maryland Workers' Compensation Act, the employee was statutorily required to reimburse the insurer for the full amount paid in workers' compensation benefits from the amount the employee recovered in arbitration from the third party tort-feasor. This is because the legislative intent was clearly to ensure that the neutral party (the employer) is not made to pay for damages caused by the actual at-fault party.

Property--Landlord/Tenant -- *Delauter v. Shafer* -- 2003 WL 2006927 (May 2, 2003).

In 1968, Mr. and Mrs. Deibert allowed their daughter and son-in-law, Mr. and Mrs. Shafer, to live on their farm and make monthly payments to help pay for taxes. The payment was made only once in 1968 and once in 1970. Mr. Deibert died in 1990, and Mrs. Shafer and Mrs. Deibert both died in 1998. The Deibert Estate sought ejectment of Mr. Shafer from the land to distribute the property in accordance with Mrs. Deibert's will. Mr. Shafer filed a counterclaim for judgment that the Estate's interest in the property was terminated under the Real Property Article where a landlord may not claim rent when rent has not been demanded or paid for 20 years. The trial court found that there was a lease for the property,

that rent had not been demanded or paid for more than 20 years, and Mr. Shafer had title to the property. The Court of Appeals reversed this decision and concluded that Mr. Shafer failed to establish a lease of the property.

Under a lease, the lessee has exclusive possession of the land. A license is simply permission to use the land. Mr. Shafer did not have a lease because he never had exclusive possession of the land since the Deiberts were on the farm every working day. Additionally, the payments were not for rent, Mrs. Diebert's will indicated that the Shafers were living rent free on the property, and there was never a demand for rent. Therefore, there was no lease, and Mr. Shafer only had a license to use the land.

Guardians Ad Litem -- *Fox v. Wills* -- 2003 WL 21003735 (May 6, 2003).

A minor sued her court appointed guardian ad litem during her parents' divorce proceeding. She alleged that he failed to prevent child sexual abuse that occurred during unsupervised visits with her father. The trial court granted the lawyer's motion to dismiss. The Court of Appeals decided that guardians ad litem have an immunity in their judicial functions, and the guardian ad litem in this case performed judicial functions and has immunity.

A guardian ad litem acts as an arm of the court in investigating the case and aids in determining the best interests of the child. However, these two roles may sometimes contradict each other. The main job of the guardian ad litem, then, is to investigate for the court. Even if an attorney is negligent as a guardian ad litem, he is immune when he performs judicial functions. Guardians ad litem are accountable through judicial mechanisms which make civil liability unnecessary. Reasons for this immunity include the attorney being free from intimidation by parents during intense custody disputes. Additionally, the parents may seek to terminate the guardian and the Court is not bound by the guardian's recommendations.

Insurance--Indemnification and Arbitration -- *Allstate Insurance Co. v. Stinebaugh* - 2003 WL 21053914 (May 12, 2003).

Constance Lee was a passenger in a vehicle operated by Charles Kirkpatrick (Allstate Insurance Co. was his uninsured motorist carrier). While stopped at a traffic light in a left turn lane, a second vehicle operated by John Stinebaugh (insured by Nationwide Mutual Insurance Co.) stopped directly behind them. A third vehicle operated by an unknown person was stopped to the right of the Kirkpatrick vehicle in the second left turn lane. When the light turned green, Kirkpatrick had to suddenly apply his brakes when he was cut off by the unknown person, causing Stinebaugh to hit Kirkpatrick's car and injure Lee. Lee filed a complaint against Kirkpatrick, Stinebaugh, and Allstate seeking damages for her injuries.

Prior to trial, the parties reached an agreement to settle Lee's claim for \$40,000 to be split evenly between Allstate and Stinebaugh through Nationwide Insurance. The Consent Order stated that each insurer's contribution towards the settlement was to be subject to reimbursement and indemnification from the other insurer pending the final determination of liability of the defendants. All cross-claims between the defendants were to remain at issue, subject to resolution of the trial, or were to be resolved by other means mutually agreed to by all the defendants. Allstate and Nationwide filed a motion to compel arbitration which was denied by the Circuit Court because Stinebaugh did not consent to arbitration and no party could be forced into it. Despite the Circuit Court's ruling, Allstate initiated arbitration and the arbitrator determined that Stinebaugh had been negligent. However, the Circuit Court entered judgment in favor of Stinebaugh against Allstate. The Maryland Court of Appeals held that the issue of arbitrability was for the trial court to decide and that indemnification and reimbursement disputes between the insurers was not subject to arbitration. It found that the Consent Order clearly indicated that the liability determination was to occur in the trial. Therefore, the Consent Order

superseded any arbitration agreement and discharged any right that Allstate would have had to arbitrate the negligence controversy.

Judicial Review -- *Dorsey v. Bethel A.M.E. Church* -- 2003 WL 21297195 (June 6, 2003).

The defendant church sought approval of its plan to build a new church and related facilities. The trial court dismissed the petitioners' judicial review action on the ground that it was premature. The Court of Special Appeals dismissed the petitioners' appeal on the basis that petitioners lacked standing, not having been parties to the hearing before the board.

On appeal, the Court of Appeals held that lack of standing to initiate an action in a trial court was not a ground for dismissal of an appeal. Moreover, considering the informal nature of most administrative proceedings and the lenient standards for party status at such proceedings, the Court of Special Appeals erred in finding that the individuals were not parties before the board. However, the court held that the trial court correctly dismissed the petitioners' judicial review action as premature. The board's decision was not a final administrative decision, as there was more for the agency to do. Therefore, the petitioners clearly had not exhausted their administrative remedies. Accordingly, under Maryland caselaw, the decision was not subject to judicial review.

Workers' Compensation -- *Harris v. Board of Education of Howard County* -- 2003 WL 21296460 (June 6, 2003).

Vernell Harris was a Food and Nutritional Service Assistant at a high school. One day at work, while bending over to pick up a bag of soap powder she suffered a severe injury to her back. Subsequently, she filed a claim with the Workers' Compensation Commission which found that she was entitled to compensation. The employer, Howard County Board of Education, filed an action for judicial review. The jury returned a verdict in favor of the employer, finding that she was not entitled to compensation under the Maryland Workers' Compensation Act because the injury did not arise out of "unusual activity" as previous cases have held necessary. The Court of Special Appeals affirmed the jury verdict.

On appeal, Harris asked that the Court of Appeals restore the use of the meaning of the word "accident" to its original court interpretation which was "an untoward event which was neither expected nor intended" and referred to the injury itself - not the activity which resulted in the injury. The Court of Appeals found for Harris, reversed the Circuit Court's decision and ordered the Circuit Court to affirm the decision of the Workers' Compensation Commission. It found the judicial insertion of the "unusual activity" requirement into the Workers' Compensation Act erroneous, that it has not been uniformly followed by the court, has been inconsistently applied, and has treated differently employees who were injured under similar circumstances. It held that under the plain language of the statute, what must be "accidental" is the injury and not the activity giving rise to the injury. It therefore abandoned the "unusual activity" requirement for workers' compensation coverage.

Insurance Coverage -- *Mamsi Life and Health Insurance v. Callaway*-- 2003 WL 21348343 (June 11, 2003).

An insured man died while engaged in the act of autoerotic asphyxiation, a form of sexual masochism. Autoerotic asphyxiation involves restriction of the brain's oxygen supply to increase sexual arousal. The insurance company denied coverage based on an exclusionary clause within the policy. The Court of Appeals held that whether or not the insured caused his death intentionally, the policy excluded recovery if the insured's death was the result of intentional self-injury. The court ruled that it was incorrect to analyze the policy's terms "accident" and "injury" in a single inquiry.

The policy established two inquiries: first, whether the insured's death was an accident; and, if so,

whether the death resulted from a self-inflicted injury. The first inquiry addressed the nature of the overall event, and the second addressed only causation. The court believed that the insured's death could be accidental, even if the insured intended the acts that led to it. A layperson understood the insured's partial strangulation to be an injury as that term is commonly used. That the insured may have derived pleasure from the injury did not mean there was no injury. By depriving his brain of oxygen, the insured injured his brain, eventually leading to his death. Therefore, the Court of Appeals ruled that the trial court properly granted summary judgment to the insurer based on the policy's intentional self-injury exclusion.

Jury Instruction -- *Fry v. Carter* -- 2003 WL 21355454 (June 12, 2003).

Howard Fry was a traffic control manager who was killed alongside a highway when he was struck by roof trusses that extended over the side of a passing flat-bed tractor-trailer driven by Sonny Carter. Fry's relatives brought a suit against Carter, his employer and trailer owner, and tractor owner, alleging that their negligence caused Fry's death. The Circuit Court denied the petitioners' motion for judgment on the issue of negligence but over their objection, gave the jury an unavoidable accident instruction. As a result, the jury returned a verdict in favor of all the defendants. The Court of Special Appeals affirmed the decision.

However, the Court of Appeals held that the Circuit Court erred in instructing the jury on unavoidable accident because it found there was ample evidence from which the jury could infer Carter's negligence. The error was prejudicial and constituted reversible error. The issue in the case was whether, under all the circumstances, Carter was negligent, not whether Carter could have avoided the accident at the last minute. The court found that the unavoidable accident instruction tends to mislead the jury by creating a spurious additional issue in the case when in fact the sole issue is the presence or absence of negligence proximately causing the accident. Therefore, the court held that the unavoidable accident instruction is no longer to be given in any negligence action in Maryland courts from the date the opinion was filed.

Trusts and Estates -- *Duvall v. McGee* -- 2003 WL 21374079 (June 16, 2003).

James McGee was convicted of felony-murder for participating in a robbery that resulted in the killing of Katherine Ryon. Robert Ryon Duvall was the personal representative of Katherine's estate. Duvall brought suit against McGee seeking compensatory and punitive damages for the battery of Katherine Ryon and the conversion of her personal property. The parties settled the conversion count in favor of Ryon's estate for \$600,000. McGee was the beneficiary of a spendthrift trust set up by his deceased mother that was valued at \$877,000. The trust prohibited McGee from alienating the trust principal or any income from the trust while it was in the hands of the Trustee. The trust also shielded both the principal and the income from claims of McGee's creditors.

Duvall sought to satisfy the tort judgment by invading the principle of the trust. He argued that tort-judgment creditors should be included as an exception to the spendthrift doctrine and be allowed to invade spendthrift trusts. This is because Katherine Ryon had no opportunity to investigate the creditworthiness of the tortfeasor prior to suffering from the tortious conduct - unlike other creditors. He also contended that Maryland public policy dictates that tort-judgment creditors be deemed a special class of creditors entitled to invade a spendthrift trust. The Circuit Court, in recognizing that Maryland law only allowed invasion of such trusts by a narrow class of creditors, and only in limited circumstances (such as when there are claims for alimony arrearage, child support, and collection of back taxes), declined to expand the class or the circumstances. The Maryland Court of Appeals affirmed the Circuit Court decision reasoning that to hold tort judgment creditors among the class of creditors that have traditionally been allowed to invade a spendthrift trust in satisfaction of a judgment it would

essentially be rewriting Maryland law. This can only be done by the legislature.

Administrative Law -- *Brown v. Fire and Police Employees' Retirement System* -- 2003 Md. Lexis 331 (June 17, 2003).

Petitioners were all former Baltimore City police officers. The Retirement System provides several different types of benefits for police officers and it is mandatory for all police officers to become members of the system as a condition of employment. All petitioners had successfully sought an absolute divorce judgment from the circuit court. The Retirement System notified all of the officers that under the divorce orders, the wife of each officer was granted a share of her husband's pension benefits.

The petitioners initiated a declaratory judgment action in the Circuit Court to decide whether the compensation retirement benefits disbursed by the Retirement System were marital property such that their wives would be able to receive a portion of them. The Maryland Court of Appeals dismissed their action because the action was premature since all statutorily prescribed administrative remedies must be pursued and exhausted before seeking judicial review. Members of the Retirement System have two avenues to appeal a decision regarding benefits and the petitioners did not utilize either of them. It held that the petitioners could only appeal from a final decision of the Retirement System Board. Until they received such a decision, any judicial action would be improper.

Interlocutory Appeals -- *Dawkins v. Baltimore City Police Department* -- 2003 WL 21403739 (June 19, 2003).

An individual alleged that she sustained injuries when she was pushed to the ground by a police officer. She brought a tort action against the mayor, city council, the police department, and a few individual police officers. The mayor and city council had their motions to dismiss granted. The other defendants filed numerous motions to dismiss based primarily on claims of "sovereign immunity," "governmental immunity" and "public official immunity." The Circuit Court denied all immunity motions filed by the remaining defendants. The defendants appealed the Circuit Court's denial of their immunity defenses and the Court of Special Appeals vacated the Circuit Court's denial and ordered the court to enter judgments in the defendants' favor.

The Court of Appeals held that the interlocutory Circuit Court orders that overruled the defenses of sovereign immunity and public official immunity were not immediately appealable under the collateral order doctrine. The collateral order doctrine "treats as final and appealable a limited class of orders which do not terminate the litigation in the trial court." The Court of Appeals overruled *State v. Hogg* and held that the doctrine can only be used in very few extraordinary situations. Now as a general rule, interlocutory trial court orders rejecting defenses of common law sovereign immunity, governmental immunity, public official immunity, statutory immunity or any other type of immunity are not appealable under the Maryland collateral order doctrine.

Collateral Order Doctrine -- *Theurer v. Farrell* -- 2003 WL 21403730 (June 19, 2003).

The personal representatives of the estate of a firefighter who was killed in a motor vehicle accident allegedly caused by the son's intoxication brought suit against the Prince George's County Chief of Police and several other officials of the Prince George's County Police Department. The plaintiffs claimed that their son had consumed a large amount of alcohol prior to the accident in conjunction with his participation in the police department's driving while intoxicated program for police officers. Two counts of the plaintiff's wrongful death and survival action were dismissed; however, the trial court denied the defendants' immunity-based motion for summary judgment as to the remaining two counts. The intermediate appellate court determined that the denial of the motion for summary judgment was

appealable. However, on appeal, the Court of Appeals summarily reversed the decision. In its holding, the court cited to a new opinion that interlocutory orders denying immunity defenses generally were not appealable under the collateral order doctrine.

MARYLAND COURT OF SPECIAL APPEALS

Evidence--Trial Testimony -- *McCracken v. State of Maryland* -- 2003 WL 1618157 (March 31, 2003).

Police officers responded to a call from bank employees that the defendant had entered the bank wearing a gun holster strap across his chest with a noticeable bulge under his jacket. An officer escorted the defendant out of the bank, where other officers searched the man and found an antique handgun on him. In response to questioning, the defendant told the officers that the gun was not real, but that when the trigger was pulled, it would shoot a projectile out of the muzzle, and when fired, the gun was capable of killing. The trial court granted defendant's motion to suppress his statements because they were made while defendant was in custody without having been given his Miranda rights. However, the trial court permitted an officer at trial to testify as to the statements in rebuttal to defendant's testimony.

On appeal, the court found that given the State's failure to satisfy the foundational requirements under Md. R. 5-613 for impeachment by a prior inconsistent statement, the trial court erred in permitting the rebuttal testimony. Further, the trial court's failure to give a limiting instruction, even if that point was unpreserved, constituted plain error.

Evidence--Collateral Source Rule -- *CSX Transportation Inc. v. Haischer* - 2003 WL 1970482 (April 30, 2003).

A locomotive engineer was injured on the job and filed suit against his employer pursuant to the Boiler Inspection Act ("BIA.") At trial, the court did not allow evidence of the employee's receipt of a railroad retirement annuity, under the collateral source rule. The collateral source rule excludes evidence of damages paid by a source other than the defendant. The appellate court held that the evidence allowed the jury to decide if the railroad was liable for the employee's injuries under the BIA since it showed the device on which the employee was hurt. That device, which was an integral part of the operation of the locomotive on which the employee was injured, took on an abnormal characteristic and became an obstruction causing the injury.

The court ruled that while counsel's opening statement and closing argument did not warrant allowing the railroad to introduce evidence of the employee's railroad retirement annuity, his affirmative evidence of his reduced financial condition allowed the railroad to inquire into the annuity. Additionally, his admissions that the employee did not seriously try to obtain other employment and did not take advantage of vocational rehabilitation services the railroad offered, while not suggesting the employee exaggerated the extent of his injury, were, at least, a suggestion of malingering, allowing the railroad to introduce evidence of the employee's collateral annuity payments. The decision of the lower court was thus affirmed in part and reversed in part.

Property--Standing to Challenge Zoning Decisions -- *Superior Outdoor Signs, Inc. v. Eller Media Co.* -- 822 A.2d 478, 2003 WL 1970751 (April 30, 2003).

The Board of Zoning Appeals of the Town of Willards ("Board") granted variances to Eller Media Company ("Eller") and E. Dean Richardson allowing them to replace two existing non-conforming billboards and to erect two new billboards on property on Route 50 ("Subject property"). Superior Outdoor Signs, Inc. ("Superior") and one of its business owners, Scott Gregory, brought an action for

judicial review of the Board's decision.

Eller and Richardson filed a motion to dismiss on the basis that Superior and Gregory did not have standing to bring such an action. Maryland's land use code limits those who can appeal a Board's decision to: (1) a person aggrieved by the decision; (2) any taxpayer; and (3) any officer, department, board, or bureau of the local jurisdiction. Gregory conceded that Superior did not have standing but alleged that he did. Gregory argued he had standing because as a business owner of Superior he was an aggrieved person as Superior was located on adjacent land to the Subject property and his business was in competition with Eller, and that he fell under the category of "any taxpayer."

The Maryland Court of Special Appeals held that Gregory did not have standing to appeal the Board's decision to grant Eller and Richardson the variance. The Court held that even if a business owned land which was adjacent to property which was the subject of the Board's zoning decision, that did not mean that the business owner had an ownership interest in his business' land which meant that the business owner was not an aggrieved person. Secondly, a person is not "aggrieved" for standing purposes when his sole interest in challenging a zoning decision is to stave off competition with his established business. And finally, the type of taxpayer who has an interest that could be affected by the Board's decision is only a property taxpayer within that jurisdiction. Therefore, because Gregory did not live in the town of Willards, but lived in Salisbury, he was not "any taxpayer" within the legislative intent of the statute.

Torts -- *Bricker v. Warch* -- 2003 WL 1989483 (May 1, 2003).

An insurance claims adjuster claimed that he sustained injuries from a fall at a Frederick County school. The school's insurer assigned the claim to an employee in its Special Investigation Unit. The investigator suspected insurance fraud and referred the case to the Insurance Fraud Division of the Maryland Insurance Administration, which declined to prosecute the claimant. The investigator then took the case to the Frederick County Police Department and State's Attorneys Office, where a grand jury indicted the claimant on insurance fraud but he was acquitted. The claimant then filed charges against the insurance company and the investigator for malicious prosecution, intentional infliction of emotional distress, negligent infliction of emotional distress, defamation and for breach of contract against the insurance company. Several issues remained on appeal--whether the trial court properly dismissed the insurance company to which the investigator's division was transferred and whether the trial court properly dismissed the claims of malicious prosecution and breach of contract. The Court of Special Appeals of Maryland found that the second insurance company was properly dismissed, the investigator was immune from civil liability for reporting suspected insurance fraud, and there was no breach of contract.

Under Maryland law, any person who reports in good faith a suspected case of insurance fraud is not subject to civil liability. The claimant alleged that this only applied to the first report because this investigator reported his case more than once. However, the Court ruled that the reports were made in good faith and the Legislature did not intend for the immunity to apply only to the first report.

As for the breach of contract claim, the trial court's decision must be clearly erroneous for the Court of Special Appeals to reverse the decision. The trial judge made his decision because he was not persuaded by the testimony of the claimant's witnesses. Therefore, the decision was not reversed.

Evidence--Subsequent Remedial Measures -- *Angelakis v. Tiemourian* - 2003 WL 1995623 (May 1, 2003).

A patient filed suit against her physician who performed ultra-sound assisted liposuction (UAL) on her

abdomen and inner thighs. The patient suffered post-operative infections and skin loss. After the surgery, the doctor submitted a letter to a peer review journal suggesting that other physicians not use UAL as aggressively as traditional liposuction on the abdomen and inner thighs. A photograph of the appellant that showed her skin loss accompanied the letter. The patient claimed that she suffered scars and disfigurement as a result of the physician's negligence. The letter was inadmissible at trial, although it was referred to during testimony.

The jury found in favor of the defendants. The Court of Special Appeals affirmed and held 1) that the letter was a subsequent remedial measure; 2) the physician's testimony contradicted the letter and made the letter admissible as impeachment evidence; and 3) that the error of excluding the letter was harmless. The letter was deemed a subsequent remedial measure because it was intended to warn other physicians about using UAL aggressively on certain body parts based on what the doctor learned as a result of this patient's procedure. Public policy encourages this exchange of information without exposing the author to the possibility of lawsuits. However, the physician testified at trial that no skin loss occurred on his patient. Since his testimony contradicted his earlier letter, the trial court should have admitted the letter at trial. However, the error was harmless because the letter did not have an impact on closing arguments.

Wills and Estates -- *Orwick v. Moldawer* -- 2003 WL 2006538 (May 1, 2003).

Kurt Orwick, the oldest son from the first marriage of the decedent, challenged his father's will, arguing that his half-sister Jackie, exerted undue influence on their father when he signed the will a few days prior to his death. The will left half of the father's estate with Jackie, and half with Kurt's half-brother Michael. Alan Moldawer, the personal representative of the decedent's estate, moved for summary judgment which was granted by the Circuit Court.

Though there is no bright-line test in Maryland to determine the existence of undue influence, the Maryland Court of Special Appeals held that the evidence was insufficient to establish that Jackie had exerted undue influence over her father. Maryland courts have adhered to a list of seven factors that help to determine whether undue influence exists: 1) The benefactor and beneficiary are involved in a relationship of confidence and trust; 2) the will contains substantial benefit to the beneficiary; 3) the beneficiary caused or assisted in effecting execution of the will; 4) there was an opportunity to exert influence; 5) the will contains an unnatural disposition; 6) the bequests constitute a change from a former will and; 7) the testator was highly susceptible to the undue influence.

The Court accepted Kurt's argument that the law does not require the presence of all factors, however it found that Kurt had not presented evidence sufficient to sustain his burden of proof. Specifically, it found that Kurt had not provided any evidence to support even the inference that Jackie had maintained a confidential relationship with her father such that she would have been in a position to exert such undue influence. To the contrary, the evidence seemed to suggest that the father was very much in control of his finances and estate and sought the financial advice of an attorney, not that of his daughter.

Maryland Shield Law -- *Prince George's County v. Hartley* -- 2003 WL 2004521 (May 2, 2003).

In 2001, three journalists were covering the trial of two Prince George's County Police Officers at the federal courthouse in Greenbelt, Maryland when they overheard a comment made by Officer Brian Lott. The journalists reported in *The Washington Post*, *The Gazette Newspapers*, and *The Prince George's Journal* that Officer Lott stated, "I wish I would have been there in '95. I would have shot the bastards, and we wouldn't have all this crap." The County filed an administrative charge of unbecoming conduct against Officer Lott. The journalists refused to give statements and testify at the administrative hearing. The Circuit Court for Prince George's County ruled that Officer Lott's cross-examination of the

journalists would be restricted and, therefore, quashed the summonses that required the journalists to appear and testify at Officer Lott's administrative hearing. The Court of Special Appeals of Maryland reversed that decision.

Maryland's Shield Law, enacted in 1896, protects reporters from revealing their sources of information. However, Maryland courts have not extended this immunity to instances when reporters directly observe any acts. Officer Lott has the right to cross-examine the journalists, but the journalists may refuse to answer individual questions if the answers will disclose privileged information.

Bank's Duty to Investigate Withdrawals -- *Honeycutt v. Honeycutt* -2003 WL 2005272 (May 2, 2003).

The plaintiff corporation, which was a local tavern, and the estate of its former president brought an action alleging conversion, breach of contract and negligence against a bank for permitting an allegedly unauthorized withdrawal of funds from the tavern's bank account by one of its former officers. The officer happened to be the decedent's first wife and also worked for the bar. The plain wording of the signature card, which was a contract between the bar and the bank, allowed withdrawals to be made in either the decedent's name or his wife's name. At the time of the withdrawal at issue in the case, the bank reviewed the signature card before paying the requested \$13,066 check to the first wife.

The Court of Special Appeals affirmed the decision of the lower court, holding that the bank was not required to further inquire about the first wife's relationship to the bar or the decedent or for what the first wife intended to use the money. Nor did the bank have a duty to investigate whether the money was to be used for a corporate purpose for the bar or otherwise. According to the court, the bank had an obligation, which it fulfilled, to disburse money from the account upon receiving one authorized signature, as was required by the card. The trial court was not required to allow the representative additional time to conduct discovery for purposes of determining whether a different signature card existed, as the bank indicated it had only one card. The court held that the representative and bar's affidavits speculatively and generally alleging that there was another signature card was not sufficient to create a material fact issue to defeat summary judgment under Md. Rule 2-501(d) and the decision was therefore affirmed.

Corporate Law -- *Paskowitz v. Wohlstadter* - 2003 WL 2010807 (May 5, 2003).

A shareholder brought an action against a corporation and certain directors, alleging that the directors made materially false and misleading disclosures about a joint venture and in so doing, breached their fiduciary duty of candor. He sought to have the directors removed and replaced. The Circuit Court dismissed his claim. The Maryland Court of Special Appeals, applying Delaware law, affirmed the decision.

The Court stated that the mere fact that a director breaches his duty to disclose material information when seeking shareholder action (such as votes,) does not necessarily result in personal liability on the director's part. Whether the shareholder has suffered an injury depends on the nature of the shareholder action that was the object of the solicitation of votes. In this case, the director elections concerned corporate governance and had no impact on shareholder voting rights and therefore the shareholder bringing the action could not state a direct claim. Furthermore, the relief the shareholder sought was moot, as the directors terms had all expired from the election that was the crux of the shareholder's claim. Thus the shareholder could not plead or prove damages necessary to support a direct action.

Insurance Defense/Indemnity Agreement -- *Ulico Casualty Co. v. Atlantic Contracting & Material Co., Inc.* -- 2003 WL 2010806 (May 5, 2003).

In 1997, Gilbert Southern Corp. ("Gilbert") entered into a general contract with the State of North Carolina Dept. of Transportation to repair a segment of Interstate 85 ("the Project.") Gilbert and Atlantic Contracting & Material Co., Inc. ("Atlantic") entered into a subcontract for Atlantic to perform the concrete paving work. Ulico Casualty Co. ("Ulico") issued a bond on behalf of Atlantic, guaranteeing Atlantic's performance of its duties under the subcontract and its prompt payment to all parties that supplied Atlantic with labor and materials for the work on the Project. As consideration for the bond, Atlantic and its owners executed an indemnity agreement that included a good faith clause in favor of Ulico.

In 1998 Clearwater Hydraulics & Driveshaft Service ("Clearwater") informed Ulico that Clearwater had billed Atlantic for \$21,843.48 in repairs to equipment that Atlantic was using in connection with the Project and that remained unpaid. On September 3, 1998 Atlantic informed Ulico that the balance of Clearwater's bill was in dispute and must be resolved before completion of payment. Ulico was not informed of what to do about the dispute after several unanswered inquiries to Atlantic and issued a check to Clearwater for the balance of its bill on December 31, 1998. On January 4, 1999 Atlantic informed Ulico not to pay Clearwater as the bill was predicated on unauthorized work. Since Ulico had already paid Clearwater, it sought to enforce Atlantic's indemnity agreement and Atlantic refused to make payment to Ulico .

The Maryland Court of Special Appeals held that Ulico was entitled to reimbursement from Atlantic for a claim Ulico paid in good faith, without fraud, regardless of whether Ulico was actually liable for the claim - either by virtue of a defense of Atlantic to the claim or by virtue of the claim's being outside the scope of the bond. This is because a good faith clause in an indemnity agreement is to entitle the surety to reimbursement when the surety has made the decision to pay a claim in good faith and without fraud. The Court also held that under the terms of the indemnity agreement, Atlantic was contractually obligated to pay Ulico the sums it incurred to enforce the agreement, including its attorneys' fees, costs and expenses.

Motor Vehicle Collision -- *Mason v. Lynch* -- 2003 WL 21003743 (May 6, 2003).

Plaintiff was stopped for traffic when a vehicle operated by defendant collided with the rear of a vehicle that was stopped behind plaintiff's vehicle, forcing that vehicle into the rear of plaintiff's vehicle. Plaintiff claimed to have sustained a closed head injury, cervical strain and a temporomandibular disorder. She established medical expenses of \$13,847 and lost wages of \$373. The appellate court found no error in the trial court's admission of the photos of plaintiff's vehicle and in its allowing defense counsel to argue a correlation between the extent of damage to the vehicle and plaintiff's injuries. Furthermore, the court ruled that the trial court properly determined that the photos were relevant and that their probative value was not substantially outweighed by the danger of unfair prejudice. The trial court did not abuse its discretion in denying plaintiff's motion for a new trial, as defendant offered evidence refuting plaintiff's claim of causation, including the fact that (1) plaintiff did not claim any injuries at the scene of the accident, (2) she went to see a lawyer before going to a doctor, (3) there were gaps in treatment, and (4) she had been hurt in an earlier accident.

Property--Adverse Possession -- *Hughes v. Insley* - 2003 WL 21221617 (May 28, 2003).

For decades, the claimant and his predecessors had openly used undeveloped land to which the record owner had title. The claimant's grandfather died before the 20-year adverse possession period had run. The claimant's father did occupy the land for the requisite period, but never sought an adjudication of title by adverse possession. The claimant then pressed his own claim when the record owner sought to quiet her title, but in that action, the trial court found that while the adverse possession had gone on for years, the claimant could not tack his own possession onto that of his father to satisfy the 20-year

period.

A few years later, when the record owner sought to eject the claimant from the land, the appellate court held that although the adverse possession period had recommenced from the beginning when the record owner defended the earlier adverse possession counterclaim, res judicata principles did not preclude the claimant from claiming title because, in the intervening years, his mother had assigned all her interest in the land to him. By operation of the doctrine of after-acquired title, the court ruled that the good title the mother conveyed to herself from her husband's estate passed to the claimant.

Property--Non-Conforming Use -- *Trip Associates, Inc. v. Mayor and City Council of Baltimore* -- 2003 WL 21221687 (May 28, 2003).

"Club Choices" is a night club that features adult entertainment in Baltimore City, Maryland. In April 2000, Anthony Triplin, the owner of the club, received a zoning violation notice for providing adult entertainment without a license. At a public hearing, Triplin provided evidence that he had owned the club since 1983 and had been providing adult entertainment two nights a week ever since. He also testified that the club had featured adult entertainment for five years prior to his acquisition of the property. The Board of Municipal and Zoning Appeals ("Board") found that Triplin had established a nonconforming use of the premises for adult entertainment, but limited such use to no more than the present level of two nights a week. The Circuit Court affirmed the Board's decision, but ordered Triplin to obtain an adult entertainment license.

The Maryland Court of Special Appeals affirmed the Board's decision to limit the club's use for adult entertainment to no more than two nights a week. It based its decision on the fact that limitations on the continuance of nonconforming uses are meant "to achieve the ultimate elimination of nonconforming uses through economic attrition and physical obsolescence. The Court followed many other jurisdictions in holding that the general policy against the expansion of non-conforming uses applies to temporal expansions. However, the Court of Special Appeals held that the Circuit Court erred in ordering Triplin to obtain a license. This is because a court reviewing an administrative agency decision cannot decide issues presented to it for the first time on judicial review that are not encompassed in the final decision of the agency.

DISTRICT OF COLUMBIA COURT OF APPEALS

Medical Malpractice -- *Hardi v. Mezzanotte* - 818 A.2d 974 (March 20, 2003).

A patient brought a medical malpractice action against her physician, alleging negligence in failing to diagnose her with diverticulitis, an infectious process affecting the colon. The trial court, in its application of the discovery rule, concluded that the three-year statute of limitations did not bar the patient's claims. The defendant doctor argued that the patient had actual knowledge of her injury more than three years before she filed her complaint, barring a suit at the present time. However, the appellate court noted that the doctor was attempting to charge the patient with knowledge and an understanding of her medical condition when even a specialist failed to diagnose it. In addition, the evidence at trial established proximate cause.

Acceptance of one expert's testimony over another was within the trial court's province as the fact finder in a bench trial. Unpaid and written-off medical expenses could be recovered as compensatory damages. The appellate court found that the written-off expenses were a benefit from a collateral source that could not be used to reduce the amount of damages owed. The doctor's argument that costs were improperly awarded from the first trial, which ended in a mistrial, was rejected, as the parties agreed to the second trial based on the record of the testimony and evidence adduced at the first trial.

Inconvenient Forum - *Jacobson v. Pannu* -- 2003 WL 21025888 (May 8, 2003).

A patient began to suffer intense lower back pain and radiating pains in his legs and visited a doctor at his principal practice in the District of Columbia. Subsequent tests and surgery to alleviate the patient's pain took place in Maryland. The patient eventually sued for malpractice, alleging permanent incontinence of bowel and bladder caused by the doctor's negligence in severing four nerves during the surgery.

The appellate court held that although the patient and the doctor lived in Maryland, the records were there, and the alleged malpractice took place there, the doctor was primarily a D.C. practitioner and the doctor-patient relationship began in D.C. Balancing the public and private factors, the trial court properly declined to dismiss the case based on forum non conveniens.

Torts--Defamation and Intentional Infliction of Emotional Distress -- *Carter v. Hahn* -- 2003 WL 1888918 (April 17, 2003).

A DCHA employee moved and arranged to have her paycheck mailed to her new address. However, she never received that paycheck so DCHA stopped payment on the original check and mailed a replacement check. The original paycheck was cashed by someone at a liquor store. When DCHA refused to reimburse the store operator for the check, the store operator claimed that it was the employee herself who cashed the check. The employee was arrested because of the store operator's claims. When the store operator could not identify the employee, the charges were dropped. The employee filed civil charges against the store operator for defamation and intentional infliction of emotional distress. The trial court granted a directed verdict in favor of the store operator. The District of Columbia Court of Appeals reversed this decision.

To prove defamation, the employee must show that the store operator made a false and defamatory statement, that the store operator published the statement without privilege to a third party, that his fault in publishing the statement amounted to at least negligence, and the statement either caused special harm to the plaintiff or special harm was not necessary as a matter of law. If the case had gone to a jury, the jurors could reasonably have found defamation by the store operator. To prove intentional infliction of emotional distress, the employee must show extreme and outrageous conduct on the part of the store operator which either intentionally or recklessly caused her severe emotional distress. Again, a reasonable jury could have found for the employee in this claim as well.

UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA CIRCUIT

Evidence--Hearsay -- *Crawford v. Jackson* -- 323 F.3d 123 (March 28, 2003).

Mr. Crawford was convicted of second degree murder in 1972. He violated his parole numerous times. In 1996 he was paroled and then arrested in 1998 for aggravated assault. In 1999, his parole was revoked for the aggravated assault and drug use. Mr. Crawford filed a writ of habeas corpus challenging the revocation of his parole. Mr. Crawford claimed that the Parole Board relied solely on the police investigative report containing hearsay to revoke his parole. The United States waived jurisdiction even though Mr. Crawford was transferred to the Federal Correction Institute at Petersburg, Virginia from the District of Columbia's Lorton Correctional Complex in Lorton after it was closed in 2001. The district court denied the petition for a writ of habeas corpus. The circuit court affirmed that judgment.

It is not impermissible for a parole board to use hearsay in revocation. The report is a police investigative report, so it is detailed and reliable. Mr. Crawford made admissions that corroborated parts of the police report. Sections of the report were also corroborated by police officers who arrived at the place of the incident. Mr. Crawford had the opportunity to contradict evidence in the report, but he did

not. The hearsay in the police report does not make it any less reliable because it is a report of what the responding officer saw. Therefore, the parole board permissively used the police report in Mr. Crawford's parole revocation.

DISTRICT OF COLUMBIA SUPERIOR COURT

Contracts Entered Into by Minors -- *CPC Health Corp. v. Coles* -- Unreported (April 1, 2003).

In 1995, the defendant received hospital services when she was 17 years old. The hospital filed suit for collection of fees in 1997. The defendant never appeared in court, and judgment was entered against her. In 2001, partial payment was seized from her bank account. The defendant, then 24 years old, sought to vacate the judgment because she was a minor at the time of the services and lacked the capacity to contract.

In the District of Columbia, an individual may not formally contract until age 18. Infants are not held to contracts that burden them because public policy seeks to protect infants from unfair contracts. However, under common law and D.C. case law, minors are held to contracts that involve "necessaries," including medical services. This minor did not mislead the hospital as to her age, and she received the benefit of medical services. The court ruled that the hospital may recover the actual value of the services rendered but may not receive any profit.

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