

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

Coming of Age Rule -- *Mason v. Board of Education of Baltimore County* -- 826 A.2d 433, 2003 WL 21377582 (June 16, 2003).

Shelley Mason was born on April 4, 1979. On April 4, 2000, she filed a complaint against the Board of Education of Baltimore County, her middle school principle, and her teacher. Mason alleged that she sustained emotional injury as a minor due to sexual harassment by male students that occurred as a result of negligent supervision. The trial court applied the common law "coming of age" rule and held that Mason became of age on April 3, 1997, and that she had until three years after that date to file the suit. The court found the action barred by limitations. The Court of Special Appeals affirmed. The Court of Appeals agreed. It ruled that pursuant to the coming of age rule for computing a person's age, the day that the person was born is included in the calculation so that a person attains a given age on the day preceding the anniversary of their birth. Therefore Mason's negligence claim was untimely.

Payment Systems - *Lema v. Bank of America, N.A.* -- 826 A.2d 504, 2003 WL 21384536 (June 17, 2003).

Lema had opened two checking accounts for his accounting business at Bank of America. When he opened the account he signed a signature card in which he agreed that the accounts were to be governed by the terms and conditions of the Deposit Agreement. The Deposit Agreement provided, among other things, that the bank reserved "the right to charge back to your account the amount of any item deposited to your account or cashed for you which was initially paid by the payor bank and which is later returned

to us due to an allegedly forged, unauthorized or missing endorsement, claim of alteration, encoding error or other problem which in our judgment justifies reversal of credit."

Willy Amuli, Lema's friend and former accounting client deposited a check for \$63,000 payable to Lema's accounting business at Bank of America. The check was drawn by an Italian bank on its account at the Bank of New York. In the next three months, Lema withdrew the funds and gave them to Amuli in several transactions. Bank of New York later informed Bank of America that the check Amuli had deposited into Lema's account was altered, since it was actually for \$3,000, not \$63,000. Bank of America returned \$60,000 to Bank of New York and informed Lema that it was charging his account the same amount as a result of the forgery. Lema had no knowledge of the forgery prior to the information Bank of America provided.

Lema filed a complaint against Bank of America for damages in the amount of \$60,000. The bank denied liability and filed a counterclaim alleging that Lema had violated various provisions of the UCC and "breached the contract governing his deposit accounts." The Circuit Court entered judgment in favor of Lema and dismissed Bank of America's counterclaim. It relied primarily on § 3-401 of the UCC which provided that a person is not liable on an instrument unless the person signed the instrument or authorized a representative to sign on the person's behalf. It also rejected Bank of America's claim that it had a separate contractual right to reimbursement from Lema pursuant to the Deposit Agreement. Specifically, the court noted that it would be "contrary to law to enforce the contractual agreement between the parties." The Court of Special Appeals reversed in an unreported decision.

The Court of Appeals found that the signature card, along with the Deposit Agreement, constituted the contract between Lema and the bank. It held that the Deposit Agreement altered the effect of the UCC and entitled the bank to debit Lema's account for the losses, even though the check was altered by a third party without Lema's authorization or signature. The agreement entitled Bank of America to reverse credit if an item was returned due to a claim of alteration unless prohibited by applicable law. Furthermore, the agreement did not terminate the bank's rights of charge back and reimbursement or exculpate the bank from its duties of good faith and ordinary care.

Workers' Compensation -- *McElroy Truck Lines, Inc. v. Pohopek* - 826 A.2d 474, 2003 WL 21384884 (June 17, 2003).

Pohopek, a Maryland resident, sought employment with McElroy Truck Lines, Inc. (McElroy) by filing an application in North Carolina. He was trained as a truck driver in North Carolina. At McElroy's request, he obtained a Maryland commercial driver's license. Pohopek obtained his delivery assignments by calling dispatchers in North Carolina, Alabama, and Virginia. His deliveries were primarily along the eastern seaboard. It was determined that nineteen percent of his deliveries were made in Maryland. When off duty, as part of his employment Pohopek stored, maintained, and serviced the company supplied tractor-trailer in Maryland. After six months, Pohopek was involved in an accident in South Carolina while driving the tractor-trailer. Subsequently he filed a workers' compensation claim in Maryland.

The issue before the Maryland courts was whether Pohopek was a "covered employee" under Maryland law, such that he could receive workers' compensation benefits. McElroy argued that the Maryland Workers' Compensation Commission had no jurisdiction over the case because he was not a "covered employee." The Commission and Court of Special Appeals rejected McElroy's defense, while the Circuit Court accepted it.

The Court of Appeals found that the facts and circumstances of the case revealed that the contract between McElroy and Pohopek was continuous in nature. It called for Pohopek to work for McElroy as

and when the particular and essential requirements of the business demanded. Therefore Pohopek was a "covered employee," not a "casual employee" under state law and was entitled to workers' compensation benefits. The court stated that although the amount of employment activity outside Maryland dwarfed the amount in Maryland, when each location to which Pohopek traveled making deliveries and pick-ups was considered separately, Pohopek's presence in none of them was substantially greater than in Maryland.

Denial of Class Action Certification-- Lack of Commonality -- *Creveling v. GEICO* -- 2003 WL 21512434 (July 3, 2003).

During a period when Maryland law was unsettled as to whether an auto insurer was obliged, under Md. Code Ann., Ins. § 19-505, to reimburse under Personal Injury Protection (PIP) coverage those medical expenses that were actually paid by an insured's health insurer, the insurers had a practice of denying claims for expenses that had not been personally paid by their insureds. Several such insureds filed a class action to recover those unpaid benefits immediately after the Court of Appeals decided *Dutta v. State Farm Insurance*, 363 Md. 540, 769 A.2d 948 (2001), which ruled that such benefits were payable under Maryland law.

The Maryland Court of Appeals held that while the insureds were certainly entitled to their money (which the insurers had already tendered to them), there was no longer any commonality justifying class certification, since the only common issue, recoverability of medical expenses, had already been resolved in the insureds' favor in the *Dutta* case. Additionally, neither waiver nor estoppel applied to expand the insureds' coverage. The court therefore entered judgment for the insureds in the amount of their unpaid claims, but affirmed the denial of class certification.

Recovery of Attorney Fees -- *Stavely v. State Farm Mutual Automobile Ins. Co.* --2003 WL 21730665 (July 28, 2003).

State Farm had notified Stavely of its proposed nonrenewal of his motor vehicle liability insurance policy. Stavely then filed a protest with the Maryland Insurance Administration (MIA). The MIA affirmed State Farm's proposed action and Stavely subsequently requested an administrative hearing. The Administrative Law Judge (ALJ) issued a decision in favor of Stavely in finding that State Farm's statistical basis for its underlying standards and the validity of those statistics was insufficient for its proposed nonrenewal. State Farm appealed the ALJ decision and the Circuit Court reversed. Stavely appealed and the Court of Special Appeals reversed and remanded the case. On remand, Stavely sought attorney fees. A different ALJ denied Stavely's request for attorney fees. After Stavely appealed that decision, the Circuit Court and Court of Special Appeals affirmed the denial of attorney fees.

However, the Court of Appeals held that the ALJ was barred, under the principles of *res judicata* and/or the law of the case, from reconsidering whether the proposed nonrenewal was justified, for the purposes of Stavely's request for attorney fees. Although not ruling on whether Stavely should receive attorney fees and leaving that decision to the lower courts on remand, the Court of Appeals noted that under the applicable law, an insured who prevails should normally be awarded reasonable attorney fees.

Class Action -- *Glover v. Glendening* - 2003 WL 21740362 (July 29, 2003).

A Medicaid recipient brought a class action suit against the Governor, Attorney General, the Secretary of Health and Mental Hygiene, Deputy Secretary for Health Care Financing, Treasurer, and escrow agent for declaratory and injunctive relief. The recipient argued that the money that Maryland was to receive from the tobacco industry exceeded what it had paid on behalf of Medicaid recipients like her who suffered from smoking-related injuries, and that the excess recovery belonged to her and others

similarly situated. The trial court dismissed on grounds of sovereign immunity.

The Court of Appeals held that the lower court erred and that the defense of immunity was unavailable in actions for declaratory or injunctive relief against state officials by eligible persons under the Medicaid program who claimed that state practices violated the Medicaid Act. However, in light of a 1999 amendment to the Medicaid Act, 42 U.S.C.S. § 1396k(b), which provided for payment of funds recovered from third parties to Medicaid recipients, was not applicable to the settlement of the litigation between Maryland and the tobacco industry. The recipient, and all others similarly situated, were not entitled to any future proceeds paid to the State under the settlement agreement with the tobacco industry. Though the declaratory judgment was granted for the plaintiffs based on the error of recognizing the sovereign immunity defense, the appellate court ruled in favor of defendants on the merits of the controversy.

Appeals of Administrative Decisions -- *Murrell v. Mayor & City Council of Baltimore* --829 A.2d 548, 2003 WL 21750864 (July 30, 2003).

The Department of Housing had notified Murrell of housing code violations after inspecting three of his properties. It posted condemnation notices upon each of the properties and sent Murrell a letter for each of the properties with an enclosed copy of the condemnation notice. The letters notified Murrell of the impending charges and liens for the cost of razing the properties.

Murrell requested, and was granted an appeal from the condemnation orders. A hearing took place and Murrell informed the "Building Code Official" of a plan to rehabilitate the properties within sixty days. In his affidavit, Murrell stated that the Official advised him that his plan was acceptable and that he should follow through on it. However, the only record of the hearing was a single page of paper that contained handwritten notes reciting Murrell's intent to restore the properties. After the hearing, Murrell was informed that his properties would be demolished regardless of his plan to restore them. Furthermore, the Department of Housing sent him a letter that was to serve as formal notification that the properties were to be razed according to the Building Code Official's decision. The letter was not received by Murrell.

Murrell sought judicial review of the administrative decision. The Circuit Court affirmed the decision and Murrell appealed. The Court of Special Appeals dismissed the appeal on the basis of § 12-302(a) of the Courts and Judicial Proceedings Article. § 12-302(a) states that a circuit court judgment in a statutory action for judicial review of an adjudicatory administrative decision cannot be appealed without authorization from some other statute.

The Court of Appeals reversed the dismissal by the Court of Special Appeals. It held that the substance of Murrell's circuit court action was a common law mandamus action and, as such, its decision was appealable under the general appeals statute. This is because the plaintiff asserted several non-discretionary failures on the part of the Department of Housing that were procedural duties mandated by the Baltimore City Code and principles of Maryland administrative law. The Court of Appeals found that the department failed to give Murrell the required statutory notices and the Building Code Official failed to render a formal written decision containing the reasons for such a decision, at the end of the adjudicatory hearing. Thus, the department's failure to comply with those mandatory procedural duties required a remand to the department for further administrative proceedings.

Restrictive Covenants -- *Roper v. Camuso* - 2003 WL 21750868 (July 30, 2003.)

The W.C. and A.N. Miller Development Company (Miller) developed Spring Meadows, a residential subdivision. Miller created restrictive covenants at the inception of the Spring Meadows development in

order to maintain open space concepts and views from within the development to the surrounding rolling hills. These covenants were recorded concurrently in the land records with the conveyance by Miller of all the lots in the development, with the possible exception of a lot conveyed to Elise Roper. Suzanne Camuso purchased one lot in Spring Meadows and Elise Roper purchased the adjoining lot. Camuso's covenants and restrictions were recorded concurrently in the land records. However, though Roper's deed provided that the conveyance was subject to covenants and restrictions of record, no covenants or restrictions were recorded concurrently in the land records.

After purchasing her lot, Roper built a fence along the common boundary with the Camusos' lot that exceeded the height restrictions contained in one of the covenants. The Spring Meadows Architectural Control Committee informed Roper in two letters, that her fence violated the covenants. Yet Roper took no action after either letter to remove the structure. Five years later, Camuso planted a row of trees on the same boundary that were more than eight feet tall. The branches from the trees grew over the fence onto Roper's property. Without consent, Roper pruned some of the branches, including those on Camuso's side of the boundary.

Camuso filed suit against Roper alleging trespass and destruction of property. Roper filed a counterclaim, seeking damages for malicious prosecution, a declaration that the trees violated the Spring Meadows covenants, and injunctive relief requiring Camuso to comply with the covenants as to the trees. At trial, the jury found in favor of Camuso on her trespass claim and against Roper as to her malicious prosecution claim. The trial judge ruled that Roper failed to prove by a preponderance of the evidence that she had standing to enforce the covenants since they were not recorded in the land records and dismissed her declaratory and injunctive claims on that basis. The Court of Special Appeals affirmed the judgment.

However, the Court of Appeals reversed and remanded the case. Its decision was based on a prior ruling in *Turner v. Brocato*, 206 Md. 336, 111 A.2d 855 (1955) which held that restrictions may be enforced under the doctrine of implied negative reciprocal easements against land not expressly subject to them if the party seeking enforcement shows that the following factors are present: (1) a common owner subdivided property into a number of lots for sale, (2) the common owner had an intention to create a general scheme of development for the property as a whole, in which the use of the land was restricted, (3) the vast majority of subdivided lots contain restrictive covenants that reflect the general scheme, (4) the property against which application of an implied covenant is sought was intended to be part of the general scheme of development, and (5) the purchaser of the lot in question had notice, actual or constructive of the condition.

The court found that factors one through three and five were all present and that the action turned on whether the fourth factor was present - whether Roper's property was intended to be part of the general scheme of development. It held that the fourth factor was present, as Roper's deed provided that the conveyance was subject to covenants and restrictions, the letters from the Architectural Control Committee served as evidence that it considered Roper's lot part of Spring Meadows and under the same restrictions as the rest of the community, and the fact that Roper testified that she expected the restrictions to apply to her lot.

Though it appeared Roper did in fact have standing to enforce the covenants, the court remanded the case for the lower court to determine whether the "unclean hands" doctrine barred her from bringing a claim against Camuso. The court needed to make this determination because a reasonable fact-finder could find it inequitable for Roper to enforce the covenants against Camuso if she refused to comply with the covenants herself, despite repeated attempts on behalf of the community to bring the violations to her attention.

Insurance Coverage -- *Allstate Insurance Company v. Kim* -- 2003 WL 21756859 (July 31, 2003).

A child was injured in July of 2001 when he fell out of a car his mother was driving. At the time of the accident, the mother was insured under an insurance policy her husband (insured) had purchased. The insured filed claims under the policy in his own right and on behalf of his son. In response, the insurance company filed an action against the insured, seeking a judgment declaring that it was not liable because the accident occurred before October 1, 2001, when Md. Code Ann., Cts. & Jud. Proc. § 5-806(b), which changed the law on parent-child immunity, took effect.

The Maryland Court of Appeals held that (1) automobile accidents were a prime source of injuries suffered by parents and children due to the negligence of the other, and it was entirely reasonable for the legislature to provide some measure of redress for such injuries while preserving parent-child immunity in other contexts; (2) Section 5-806(b) applied to claims filed on or after October 1, 2001, even if the incident which gave rise to the claim occurred before that date; and (3) neither the Maryland Constitution nor the United States Constitution prohibited retroactive application of § 5-806(b). Therefore, the insurance company was obligated to pay the claim.

Unilateral Modification of Contract Terms -- *Directv v. Mattingly* -- 2003 WL 21756856 (July 31, 2003).

A customer subscribed to service offered by a satellite television service provider and signed a customer agreement to form a contract with the company. The agreement allowed the service provider to change provisions in the agreement by providing the customer with written notice describing the change and provided that the customer agreed to accept changes by continuing to receive and pay for services. However, the agreement did not contain an arbitration clause. After the customer signed the agreement, the provider sent him a series of new agreements which contained an arbitration clause. The customer received all of the agreements and paid charges that were billed to him. Two years after the customer signed the customer agreement, he was assessed a late fee on one of his bills, and he filed a class action against the provider alleging that the late fees were liquidated damages, which violated the Maryland Consumer Protection Act. The defendant argued that the customer was bound by the arbitration clause to resolve the dispute. The Circuit Court for St. Mary's County dismissed the action without prejudice in favor of the defendant.

The Maryland Court of Appeals held that because the service provider did not provide written notice that the new agreements contained an arbitration clause, the customer was not bound by those clauses. The court made the distinction between an express notice that a particular provision had been added and a general notice that the contract had changed. Since the defendant did not explicitly point to and compare the new terms of the contract, it was invalid as part of the customer agreement and a customer's continuing to pay for service was not an assent to the additional terms. The customer was therefore not bound by the arbitration clause added by the defendant and the terms of the original contract controlled any disputes between parties.

Abrogation of Interspousal Tort Immunity -- *Bozman v. Bozman* - 2003 WL 21915874 (August 12, 2003).

A husband filed an action against his wife, alleging that she falsely accused him of stalking, harassment and multiple violations of a protective order. The wife had made the claims in retaliation for his decision to initiate divorce proceedings. The wife filed a motion to dismiss the action, claiming that it was barred by the doctrine of interspousal tort immunity. On the day the trial court was scheduled to hear the wife's motion, the husband filed an amended complaint, alleging that the wife made additional false claims against him after they were divorced. The trial court dismissed the husband's action, but the intermediate

appellate court held that the torts the wife committed after the parties were divorced were not barred by the doctrine of interspousal tort immunity, and it vacated the trial court's judgment dismissing count two of the husband's complaint. Both parties sought further review.

The Maryland Court of Appeals held that the interspousal tort immunity doctrine was a vestige of the past. It therefore decided that it would join the majority of courts in other states that had abolished the doctrine by abrogating the doctrine in Maryland. As a result, a plethora of cases that had applied the doctrine were also abrogated. The decision of the Court of Special Appeals was reversed and the case was remanded back to the trial court for further proceedings.

Property Dispute -- *Helinski v. Harford Memorial Hospital* -- 2003 WL 22015983 (August 27, 2003).

Joint tenants of a deceased judgment creditor filed a motion to release property from judgment levy, contending that the judgment creditor's death before sheriff executed on writ transferred the property free and clear of the judgment lien. The judgment debtor was living when the hospital recovered a judgment against her, and also when the hospital first commenced proceedings to execute on her property. She had died by the time enforcement proceedings actually commenced. The hospital therefore argued that her death had severed the joint tenancy under which the judgment debtor and two other tenants owned the land on which the hospital sought to levy.

The Maryland Court of Appeals held that in the case of real estate, as opposed to personal property, a levy could not really be said to be under way until the owner's actual possessory interest was challenged. In the judgment debtor's case, only preliminary paperwork had been completed by her death. Nothing occurred to violate the tenants' unity of time, title, interest, and possession. Therefore, the tenants' interests had passed to them free of any judgment lien before the attempted execution occurred.

Pedestrian Negligence -- *Absolon v. Dollahite* - 2003 WL 22016300 (August 27, 2003).

A pedestrian started to cross a street when the pedestrian signal displayed a walking person. Although the signal changed to a flashing hand by the time the pedestrian reached a median in the middle of the street, the pedestrian stepped off the median and attempted to cross the rest of the street. Just before she reached the curb, however, she was struck by a car that turned the corner from another street. The pedestrian sued the motorist who was driving the car that struck her, as well as the motorist's employer. Both the motorist and employer filed a motion for summary judgment, arguing that the pedestrian was contributorily negligent as a matter of law because she violated Md. Code Ann., Trans. § 21-203, which governs pedestrian crossing of roadways.

The Maryland Court of Appeals held that although § 21-203(e) arguably established a duty for pedestrians to remain on or proceed to the nearest safety island when a pedestrian signal showed a flashing hand, a violation of § 21-203 was not sufficient to establish an absolute duty, so as to satisfy the requirement of Md. R. 2-501(e) for a grant of summary judgment. Therefore, the lower courts erred by finding that the motorist and his employer were entitled to judgment as a matter of law.

Res Judicata -- *Moore v. Nissan Motor Acceptance Corp.* -- 2003 WL 22016297 -- (August 27, 2003).

Moore had purchased an automobile and financed it through Nissan Motor Acceptance Corporation (NMAC). She fell behind in her payments and NMAC repossessed the car. Under Maryland law, a creditor is required to give notice to a borrower of his or her rights within five days of repossessing the property. Moore claimed she never received the statutorily mandated notice. NMAC sold the car for less than what was owed on it, and filed suit against Moore for the difference, as well as interest and attorneys fees. Moore successfully defended the suit on the ground that she never received notice. Due to its failure to give notice, NMAC was only allowed to recover the difference, and not interest or

attorneys fees.

Eleven months later, Moore sued NMAC. Her suit was based solely on NMAC's failure to give the statutory notice. Moore alleged that she was entitled to recover damages for its failure to give notice. The trial court dismissed Moore's complaint on the ground of res judicata. The Court of Appeals granted certiorari prior to proceedings in the Court of Special Appeals. The Court of Appeals framed the issue as: "whether a party, who is sued as a defendant, successfully raises a particular defense that defeats all or part of the plaintiff's claim, but does not file a counterclaim seeking affirmative relief based on that defense, may, in a subsequent action, sue as a plaintiff on the basis of that defense."

It held that because Maryland had a permissive, rather than mandatory counterclaim rule, Moore was not precluded from suing NMAC on the basis of her successful defense that written notice was not mailed to her. The court found that Moore did not assert any counterclaim in the debt action, but argued the failure of notice solely as a defense to NMAC's claim. It noted that she neither sought nor received any affirmative relief in that action, and that she was not seeking to re-litigate the issue of whether NMAC failed to give the required notice. She was simply seeking damages based on that failure.

Tort Liability to Third Party -- *Remsburg v. Montgomery*- 2003 WL 22015980 (August 27, 2003).

James Remsburg, Jr. accidentally shot and wounded Charles and Brian Montgomery while on a hunting expedition led by his father, James Remsburg, Sr. The Montgomerys filed suit against the Remsburgs alleging both trespass and negligence. Remsburg Jr. settled with the Montgomerys and was dismissed from the suit. Remsburg Sr. filed a Motion for Summary Judgment, contending that the Montgomerys failed to properly assert the existence of a legally cognizable duty owed by Remsburg Sr. to the Montgomerys to protect them from the negligent acts of a third party, namely Remsburg Jr. Summary judgment was entered for Remsburg Sr. on all counts. The Court of Special Appeals affirmed the Circuit Court's judgment as to the trespass count, but vacated with respect to the negligence claim.

The Court of Appeals held that Remsburg Sr. had no duty in tort to protect the Montgomerys from the negligent acts of Remsburg Jr. It found no Maryland statute or regulation regarding hunting that created a duty in tort upon Remsburg Sr. to protect the Montgomerys. It also found that there was no contractual relationship that existed that would place such a duty on Remsburg Sr. Furthermore, relying on the fact that Remsburg Jr. was a 27 year old emancipated adult who had participated in over 550 previous hunting outings, the Court found no special duty that was created between Remsburg Sr. and the Montgomerys.

It held that no special duty was created by virtue of the implied or indirect relationship between Remsburg Sr. and Remsburg Jr. or, alternatively, between Remsburg Sr. and the Montgomerys. Therefore, Remsburg Sr., as a matter of law, was not liable for the injuries to the Montgomerys arising out of Remsburg Jr.'s negligent conduct.

Oral Insurance Contracts -- *Mardirossian v. Paul Revere Life Insurance Co.* -- 2003 WL 22020251 (August 28, 2003).

In 1997 Mardirossian was diagnosed with sarcoidosis, a disease of unknown cause. Pursuant to the diagnosis, Mardirossian sought to obtain additional disability income insurance coverage from The Paul Revere Life Insurance Company (Paul Revere). He informed his insurance broker of the disease and explained that before he submitted his insurance application to Paul Revere he wanted to be certain that his history of sarcoidosis would not be a disqualifying factor. The broker told Mardirossian that Paul Revere's underwriting department stated that "sarcoidosis would not be a problem" and presented him with a series of proposals for insurance coverage. Mardirossian executed the insurance application and

submitted it to Paul Revere along with a premium deposit. Subsequently, Paul Revere denied Mardirossian's application due to his history of sarcoidosis.

Mardirossian sought a judgment of specific performance ordering Paul Revere to issue the policy in state court. Paul Revere removed the case to federal court where its motion for summary judgment was granted. The 4th Circuit Court of Appeals vacated the District Court's order with instructions to certify the question. In answering the certified question, the Maryland Court of Appeals held that Maryland law provides a judicial cause of action, entirely independent of the Maryland Insurance Code, for a claim to compel specific performance on an oral contract for disability insurance.

Insurance -- *Kaser v. Financial Protection Marketing* -- 2003 WL 22020195 (August 28, 2003).

An insurance subagent and broker brought an action against a general agent for the insurer for tortious interference with economic relationship between the subagent and his client. After a broker matched his client with the agent, through whom the insurance the client wanted was issued, the agent's president persuaded the client to name the president as agent of record on the policy, in place of the broker.

The Court of Appeals held that no action for wrongful interference with economic relations would lie when the party sued was also a party to the economic relationship. It could not be implied, for this tort, that the broker had a separate economic relationship with the client based on the broker's common law right to expirations. Any independent economic relationship between the client and the broker predated the insurance contract allegedly interfered with. Once the policy was issued through the agent, the agent was a party to it.

Additionally, the broker's relationship with the client depended on the contract between the insurer, through the agent, and the client. The broker had no relationship with the client independent of the policy. As the insurer, agent, agent's president, and the president's corporation were parties to the only economic relationship between the client and the broker, they were not liable for tortious interference with that relationship.

Insurance -- *Larsen v. Chinwuba* -- 2003 WL 22087578 -- September 10, 2003

Although Maryland insurance laws required the Insurance Commissioner to preserve confidentiality about ongoing investigations, the Commissioner shared certain information about an HMO with the media. Nonetheless, the Court of Appeals held that even if the Commissioner had violated the statute, this was not determinative of the issue of whether the physician had stated a cause of action against the Commissioner as an individual. The Commissioner was not immune from liability only if his actions were found not to have been within the scope of his duties. The trial court had already found, as a matter of fact, that the acts were not malicious, so the high court looked to Maryland case law regarding respondeat superior to further determine whether the Commissioner was acting in the scope of his duties. Finding that disclosure of matters of interest to the public was a normal activity for a head of an executive department, it held that the Commissioner was immune from individual liability.

MARYLAND COURT OF SPECIAL APPEALS

Principal and Agent Relationship -- *Brooks v. Euclid Systems Corp.* -- 2003 WL 21467774 (June 26, 2003).

An investment broker fraudulently induced the plaintiff to invest in high-risk stocks without true knowledge of the actual nature of the investments. The broker enticed the plaintiff to represent that he was an accredited investor worth at least \$1,000,000, which allowed him to invest in the issuers' high-risk securities. In reality, the plaintiff's investment resulted in the loss of a substantial part of his

retirement fund. The investor filed suit against the broker, his employer and the issuers of the stock, asserting claims for intentional misrepresentation, negligent misrepresentation and negligence in the offer and sale of the securities. The Circuit Court for Baltimore County granted summary judgments to the issuers, holding that they were not vicariously liable for the actions of the broker since they were not an actual or apparent agent and no principal/ agent relationship existed.

The Maryland Court of Special Appeals held that neither the broker nor the broker's employer were the issuers' agents for several reasons. The issuers' only controls over how the employer and broker represented the securities were selling agreements requiring securities laws compliance, which gave the issuers insufficient control to create an agency relationship. Prohibiting the selling agreement's alteration showed no agency relationship. Additionally, the broker's and employer's commissions and their duty to deposit the investor's money in an escrow account created no agency. The broker and employer were primarily required to act for the investor, not the issuers. The issuers' "after-the-fact" direct dealings with the broker created no agency and the issuers did not ratify the broker's acts by accepting the investor's money, as they did not know of the broker's misrepresentations. Finally, the issuers' sale to the unaccredited investor did not show their negligence, as they had no duty to verify his accreditation. They could rely on his fraudulently induced certifications in subscription documents.

Worker's Compensation -- *Giant Food, Inc. v. Booker* -- 2003 WL 22051771 (September 3, 2003).

An employee, a janitorial worker, was exposed to Freon gas from leaking refrigeration units on two occasions while serving as part of the employer's emergency response team. About 14 months after the exposure, he was diagnosed with adult-onset asthma, and received temporary total disability benefits. A later application for permanent partial disability benefits was denied administratively, but a jury in the Circuit Court for Prince George's County allowed his claim. The employer appealed the lower court's decision.

The Maryland Court of Special Appeals held that the evidence of causation was insufficient as a matter of law to support the jury verdict. The issue of causation of asthma was complex enough to require expert testimony, but while the employee's expert appeared to be qualified to give an opinion, he failed to provide any factual basis for his assertions whatsoever. Therefore, there was no evidence from which the jury reasonably could have found the asthma to be work-related. The court reversed the judgment and remanded the matter with directions that the trial court reinstate an administrative decision denying permanent benefits.

Evidence -- *Dehn v. Edgcombe* - 2003 WL 22051480 (September 4, 2003).

Plaintiff couple alleged that the defendant doctor provided the husband with negligent post-operative care upon recovery from a vasectomy performed by a urologist. The Circuit Court for Prince George's County granted judgment against the wife. The jury found that the doctor was negligent and that the husband was contributorily negligent. On appeal, the plaintiffs argued errors in entering judgment against the wife, excluding evidence and limiting proof of damages.

The Court of Special Appeals ruled that excluding the husband's testimony that he wanted the vasectomy because of a medical condition from which he would most likely die before he was 50 years old was not in error under Md. Rule 5-403. Admitting such evidence would have engendered massive jury sympathy. Additionally, the husband was contributorily negligent by failing to follow the other doctor's instructions, resuming unprotected sex without further tests and failing to consult further with the other doctor. The contributory negligence was not related to the reasons for seeking the vasectomy.

Under Md. Rule 5-406, that the doctor once referred the husband for an operation to relieve peripheral

artery disease and 10 months later referred the husband to the surgeon again did not establish that the doctor had, in the interim, been in a doctor-patient relationship with the husband as to the earlier operation or had assumed responsibility for monitoring post-operative care. Even if it proved a pattern of monitoring post-operative care, it said nothing about the husband's contributory negligence. The husband's contributory negligence was fatal to any derivative claim by the wife and the decision of the lower court was therefore affirmed.

DISTRICT OF COLUMBIA COURT OF APPEALS

Medical Malpractice -- *Hall v. Carter* -- 2003 WL 21448422 (June 12, 2003).

Prior to her surgery, the plaintiff patient untruthfully told the doctor that she smoked a half a pack of cigarettes a day when she really smoked one pack. The doctor informed the patient that he preferred that she stop smoking, because it was not good for healing wounds. On the day of her surgery, the doctor first learned that the patient was untruthful about her smoking. Though the doctor knew that this created an increased risk of improper healing, he nevertheless performed the surgery without discussing with the patient the increased risk caused by her smoking. After the surgery, the patient's incision did not heal properly, requiring the doctor to perform two additional surgeries. The patient alleged lack of informed consent and negligent treatment. A jury in the Superior Court of the District of Columbia ruled in favor of plaintiff, awarding her \$465,000 in damages.

The doctor appealed the verdict and the District of Columbia Court of Appeals reversed the decision of the lower court. The court ruled that the patient had given informed consent to the surgery. As a result, the jury could not properly find that the doctor had the last clear chance to prevent the patient's injury, because it had to find that the doctor was initially negligent.

Additionally, although the doctor allegedly provided negligent treatment of the surgical wound infection, the patient was found to be contributorily negligent by smoking and her negligence thereby precluding her recovery of damages from the doctor.

UNITED STATES COURT OF APPEALS, FOURTH CIRCUIT

Duty to Defend -- *Northern Ins. Co. of New York v. Baltimore Business Communications, Inc.* -- 2003 WL 21404703 (June 19, 2003).

Baltimore Business Communications, Inc. (Baltimore Business), was one of several defendants named in a product liability class action lawsuit. The class action suit alleged that the defendants had manufactured, supplied, sold, and leased cell phones that emitted dangerous levels of radiation. The complaint sought "compensatory damages including but not limited to amounts necessary to purchase a [cell phone] headset . . . for each class member." Baltimore Business requested that it be defended and indemnified in the class action suit by its commercial general liability insurer, Northern Insurance Company of New York (Northern).

Northern denied the request and filed a declaratory judgment action, seeking a determination of whether it was obliged to defend and indemnify Baltimore Business. The District Court ruled in favor of Northern, determining that because the complaint merely sought cell phone headsets to prevent future injuries, its allegations against Baltimore Business did not fall within the Policy's coverage.

The 4th Circuit reversed. It found that in alleging that persons using cell phones without headsets suffer from the radiation emitted by such phones, the Complaint alleged a "bodily injury" as contemplated by the Policy. Furthermore, the Complaint sought unspecified compensatory damages flowing from bodily injuries (the harm suffered from radiation). The court found that Baltimore Business could have been

potentially liable for any and all compensatory damages recoverable under Maryland law, including damages for already existing bodily injuries. Furthermore, the court found that Northern was not relieved of its duty to defend by a statement in the products liability plaintiffs' memorandum that indicated plaintiffs were not seeking to redress any personal injuries. It held that examined as a whole, the memorandum failed to eliminate the potentiality liability on the part of Baltimore Business. Therefore the 4th Circuit vacated the lower court determination and remanded the case for further proceedings.

Individuals with Disabilities Education Act -- *Wagner v. Board of Education of Montgomery County* - 335 F.3d 297, 2003 WL 21518763 (July 7, 2003).

In *Wagner*, the court was called on to correctly interpret 20 U.S.C. § 1415(j), the "stay put" provision of the Individuals with Disabilities Education Act (IDEA). Daniel Wagner was an autistic child covered by the IDEA. Prior to the suit, he was receiving at home therapy pursuant to an Individualized Educational Program (IEP) prepared by the School Board and agreed to by his parents. However, Community Services for Autistic Adults and Children (CSAAC), the therapy provider, stopped providing services for Daniel. The School Board proposed a new IEP which Daniel's parents found unacceptable. His parents sought an injunction under § 1415(j) to effect their "stay put" rights under IDEA.

The district court found that because Daniel's current placement was unavailable due to the unwillingness of CSAAC to provide services, the School Board was required to propose an alternative equivalent placement to satisfy the "stay put" provision. However, the 4th Circuit Court held that when presented with an application for § 1415(j) relief, a district court should simply determine the child's then-current educational placement and enter an order maintaining the child in that placement. The court found that § 1415(j) does not impose any affirmative obligations on a school board. Furthermore, it held that the question of a placement's availability is entirely irrelevant to the task of identifying the child's then-current educational placement, and it is only the current placement, available or unavailable, that provides a proper object for a "stay put" injunction.

Therefore, the district court's sole responsibility was to determine Daniel's then-current IEP and should have simply entered an order maintaining him in that placement regardless of CSAAC's unwillingness to provide it. Had the Wagners wanted a change, as it appeared they did, the 4th Circuit Court held that they should have requested relief under § 1415(i)(2)(B)(iii) which empowered the court to "grant such relief as the court [would determine] is appropriate."