

Recent Developments in the Law

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LETTER

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In order to keep you abreast of recent developments in the law, Saunders & Schmieler's *S&S Recent Developments in the Law* reports on the significance of current decisions of major import in the jurisdictions of Maryland, the District of Columbia, Virginia, and the federal Fourth Circuit.

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Correction

In July of 2003, a special issue was published reporting on "a significant holding affecting landlord liability for harm to tenants caused by third parties." The holding may prove to be significant in that it indicated that claims against landlords arising from harm to tenants by third parties will more likely be determined by a jury instead of summary judgment. However, the landlord in the Hemmings case, **RLA Management, L.L.P., was not found liable** by the Court of Appeals of Maryland, as was reported. Rather, the Court of Appeals held that an "appropriate analysis [of the case] demands a closer examination of the facts in the record to determine whether the Landlord breached its duty in this case." Thus, the matter was remanded to the Circuit Court to determine whether a jury should consider the issue of landlord liability based on the alleged negligent providing of security devices.

Maryland Court of Appeals

Local law unconstitutional *Holiday Universal v. Montgomery County* -- 377 Md. 305, 833 A.2d 518 (October 9, 2003).

Holiday Universal brought suit challenging the constitutionality of a Montgomery County ordinance prohibiting unfair trade practice in the offering or sale of a future service contract. Under Bill No. 22-92,

§ 11-4A was added to the Consumer Protection Chapter of the Montgomery County Code. The court held that other than section (c)(5), the ordinance was a valid local law and did not violate the Maryland Constitution.

After an appeal and a cross-appeal from the judgment, the Court of Appeals issued a writ of certiorari to hear the case. The court looked to the specific language of the ordinance: "the ordinance covers any contract for the sale of services that will *primarily* be provided in Montgomery County or services under a contract *signed* in Montgomery County." The court held that the wording "sales of services provided primarily in Montgomery County" allows for substantial territorial effect outside of the county. Parties with as much as 49% of performance occurring outside of Montgomery County would be subject to the ordinance. Moreover, parties residing outside of Montgomery County would be bound by the ordinance just by signing the contract in Montgomery County even if none of the performance is conducted within Montgomery County. The court held that the ordinance was not a "local law" under Article XI-A of the Maryland Constitution, and was therefore unconstitutional.

Car insurance exclusion clause

Salamon v. Progressive -- 841 A.2d 858, 2004 WL 237366 (February 10, 2004).

Michael Salamon was delivering pizzas for the Pizza Connection when his vehicle collided with another vehicle. Salamon had only a personal automobile policy issued by Progressive Classic Insurance Company that he obtained before gaining employment delivering pizza. The policy contained a "pizza exclusion" (an exclusion whereby the insurer refuses coverage if the driver was delivering "property for compensation"). The court granted Progressive's motion for summary judgment based on the clear language of the policy.

The Court of Appeals overruled the trial court's summary judgment as a mistake of law. Maryland's compulsory insurance law, under 17-103 of the Transportation Article, requires that every driver maintain certain minimum levels of motor vehicle insurance. The court cited a prior Maryland case, emphasizing that any portion of a motor vehicle insurance policy that is inconsistent with this statutory scheme is void and unenforceable. *Lewis v. Allstate Ins. Co.*, 368 Md. 44 (2002). The court held that absent authorization by the Maryland General Assembly or a Maryland statute that either expressly or implicitly gives insurers permission to include this type of exclusion, insurance providers can not reduce or eliminate benefits below the statutory minimum levels.

Local ordinance on discrimination

Edwards v. Corbin -- 841 A.2d 845, 2004 WL 235590 (February 10, 2004).

Corbin, an African American female, filed six claims against her employer for discrimination. Of these six claims, three were based upon Maryland Art. 49B, § 42, coupled with §§ 2-186(a)(3) and 2-222 of the Prince George's County Code. Edwards Systems Technology (EST) claimed that the cause of action authorized by Art. 49B, § 42, combined with the county ordinances violates Article XI-A of the Maryland Constitution. The Court of Special Appeals held that this statute did not violate the constitution.

The Court of Appeals addressed the sole issue of whether the Court of Special Appeals erred in holding that the cause of action authorized by Art. 49B, § 42, combined with §§ 2-186(a)(3), and 2-222 of the Prince Georges County anti-discrimination ordinances, did not violate Article XI-A of the Maryland Constitution.

The state statute, Art. 49B, § 42, authorizes the enforcement of local anti-discrimination ordinances by causes of action in the circuit courts in three Maryland counties (Montgomery, Prince George's, and

Howard). The court held that Art. 49B, § 42 is not a "local law" because it applies to three counties and is not "local" under the express language of Article XI-A, § 4. In addition, it creates a new cause of action in the circuit courts; therefore, under *McCrory Corp. v. Fowler*, 319 Md. 12, 570 A.2d 834 (1988), is not a local law. The court went on to explain that a local ordinance may be inconsistent with state public laws in one of three ways: (1) It could be in direct conflict with a public general law; (2) it could be the type of ordinance which is expressly preempted by a public general law; (3) it could be impliedly preempted by public general laws because the general assembly has intended to occupy the entire field within which the ordinance falls. The court held that the ordinances did not violate these aforementioned limits and affirmed the Court of Special Appeals ruling.

Punitive damages standard of evidence

Darcars v. Borzym -- 841 A.2d 828, 2004 WL 230607 (February 9, 2004).

Borzym made several trips to Darcars in order to negotiate the purchase of a 1999 BMW 323i. Borzym eventually purchased the car on a Friday evening, producing all documents other than insurance information. The following morning Borzym produced insurance information and left with the car. He later received calls from the dealership about problems with the insurance on the car and that he would need to provide information for a different policy. Borzym did so and informed Darcars of this new policy on Tuesday. Borzym received additional calls that there were problems with the new policy as well, and on Thursday, the car was repossessed from the parking garage where Borzym had left it.

The car had \$300 of CDs and a laptop estimated at \$1500. When Borzym went to the dealership to investigate the matter, he was told that he "didn't pay anything." He was told "to get out of here...call your attorney." When Borzym's father, who had been outside waiting, confronted the Darcars staff about the matter a security officer stepped in. The Borzys were "cursed out" and called "thieves." Borzym did not recover the \$2500 cash down payment or the laptop and CDs that had been in the car at the time of repossession.

The jury returned a verdict in favor of Borzym, awarding him \$4300 in compensatory damages and \$100,000 in punitive damages (reduced by the court to \$25,000). The Court of Special Appeals affirmed both the compensatory and punitive damage awards.

Darcars appealed the punitive damages award. The Court of Appeals disagreed with the Court of Special Appeals on the issue of the sufficiency of evidence in support of the award for punitive damages. The correct standard to be applied, the court explained, is the "clear and convincing evidence" standard. Nevertheless, the court affirmed the lower court's decision, finding there was sufficient evidence to support a finding of malice necessary for an award of punitive damages. The court maintained that actual malice must be supported by clear and convincing evidence.

The court also held that while evidence of a defendant's financial condition is relevant in determining whether a jury may award punitive damages, the Plaintiff has no burden to present evidence of a defendant's financial condition.

Maryland Court of Special Appeals

Assumption of the risk in sports

Kelly v. McCarrick - 841 A.2d 869, 2004 WL 210579 (February 5, 2004).

Tara Kelly, a 13 year old playing second base, had her ankle broken when another player slid into second base during a game of fast-pitch softball. Tara was attempting to tag the other player out. She was carried to her mother's car and driven to the hospital. The Kellys claimed four counts of negligence on the part of the operators of the field and the coach of the team. The court granted the defense's

summary judgment.

The Court of Special Appeals upheld the summary judgment, stating that the "negligent coaching" claim was the first of its kind in Maryland. There was no evidence of negligent coaching and therefore no liability in the instant case. The Court held that the same standard for the assumption of the risk doctrine for negligent play claims should apply to negligent coaching claims as well. The other claims of negligent matching of players of differing talent levels, failure to use breakaway bases, and negligence in the post-injury care were also dismissed. The court noted the majority view that a claim for personal injury incurred during a voluntary athletic competition may not be premised on mere negligence, but must be due to intentional or reckless acts or omissions. The court upheld the negligent mismatching claim since the grouping of players of various skill levels is an inherent and foreseen aspect of team sports. The breakaway bases claim also was rejected by the court as there was evidence that Tara regularly played on fields with stationary bases, constituting knowledge of an open and obvious risk. Finally, the post-injury care claim was also rejected as no evidence was produced to support this claim.

Second permittee driver

Liberty Mutual v. Maryland Automobile Insurance Fund -- 154 Md. App. 604, 841 A.2d 46 (January 29, 2004).

Dennis Ray Drewery lent his car to his son, Ray Jr., to drive his mother to work. Ray (the son) then allowed a friend, Leo J. Stevenson, to drive the automobile. This was done without permission from Mr. Drewery (father). Leo struck a parked truck which was propelled forward and struck Donald Andrew, a pedestrian. Andrew's insurance carrier, Liberty Mutual, subsequently paid worker's compensation benefits to Andrew. Liberty Mutual then filed for declaratory relief, requesting a declaration that Stevenson was covered by Drewery's insurance policy with MAIF. The court ruled that Stevenson was not covered under the Maryland Automobile Insurance Fund (MAIF) because Stevenson did not have the express permission of the insured to drive the car and because Mr. Drewery and Ray had an understanding that only Ray was permitted to drive the car.

The Court of Special Appeals upheld the ruling that Ray was not an insured as a second permittee. The court further distinguished a situation when, absent express permission, permission could be implied. If the operation of the car was "for a purpose germane to the permission granted" by father to son, coverage of the driver would result. Stevenson was using the automobile outside the scope of the permission granted; therefore, permission could not be implied.

Bonus pay included as income

-- *Johnson v. Johnson* -- 152 Md. App. 609, 833 A.2d 46 (October 3, 2003).

Robert and Ann Johnson are the parents of three minor children. Mrs. Johnson was awarded custody of the three children as of their divorce on October 7, 2002. The child support agreement signed on July 10, 2002 was based on Mr. Johnson's income of \$90,000 (\$7,500 per month) and Mrs. Johnson's income of \$28,000 (\$2,333 per month). At the time the initial child support was determined, Mrs. Johnson was not aware of Mr. Johnson's bonus of \$41,400.

Including the bonus, Mr. Johnson earned \$122,900 per year. Mr. Johnson's income consisted of a base salary of \$80,000, dividends of \$1500, and a bonus of \$41,000. Under the guidelines, the maximum monetary guidelines for parents who earn \$10,000 per month and have three minor children is \$2,026. Because the Johnsons earned \$2,575 per month more than the \$10,000 per month guideline maximum, the court increased the total obligation by 10% to \$2,575, bringing the total obligation to \$2,283.50 (\$2,026 + 257.50). Mr. Johnson was to pay 81.45% of this figure (\$1,860).

The trial court ruled that the bonus should be included. The Court of Special Appeals upheld the lower court's ruling that the bonus should be included as income for the purpose of determining child support. The court ruled that the "actual income" as stated in FL § 12-201(c)(3)(iv), includes "bonuses." Mr. Johnson argued that his \$41,400 bonus should not be included because it is too speculative as to what bonus he may or may not receive in the future. The court disagreed, saying that child support should be based on current income and that if Mr. Johnson's income were to change, he would be within his rights to petition the court for a recalculation of child support at such time.

Retroactive application of decision to pending case

-- *Polakoff v. Turner* -- 841 A.2d 406, 2004 WL 206130 (February 3, 2004).

A minor, through her mother, brought a negligence action against landlord and property management company, alleging lead paint poisoning from exposure to lead paint in leased premises. The jury awarded \$500,000 against the landlord and property company but the court applied the statutory cap on non-economic damages, reducing the amount to \$350,000.

On appeal, the issue before the Court of Special Appeals was whether the *Brooks v. Lewin Realty III, Inc.*, 378 Md. 70, 835 A.2d 616 (2003) decision should apply to the pending case. The court indicated three scenarios of cases in determining whether a case should be applied retroactively or prospectively. First, decisions which do not declare new law should be applied retroactively. These decisions are ones applying an existing law to a new fact pattern. The second type is one in which a prior interpretation of law is overruled. This type of decision should apply to all pending cases as well. The third type of decision is one where the Court of Appeals changes the common law of Maryland. Such a decision should only apply to causes of action that accrue after the date of the holding.

In the instant case, the court held that the earlier decision in *Brooks* applies. In *Brooks*, the court held that a plaintiff may establish a prima facie case of negligence based upon a violation of the Baltimore City Housing Code simply by introducing evidence that there was flaking, loose or peeling lead based paint in the premises. This effectively eliminated the notice standard, under which landlords were only liable if they knew, or had reason to know, of flaking, loose, or peeling paint, and had an opportunity to repair the situation. The court stated that the *Brooks* decision did not change the common law; rather, it applied settled common law principles. The court therefore held that the *Brooks* decision should apply to pending cases as well.

The minor plaintiff appealed the decision to reduce the damage award, claiming that § 11-108 was unconstitutional under equal protection grounds. The Court of Special Appeals upheld the statutory cap on non-economic damages, citing the rational basis test outlined used in *Murphy v. Edmonds*, 325 Md. 342, 601 A.2d 102 (1992).