

Recent Developments in the Law

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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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Recent Developments in the Law

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Court of Appeals of Maryland Informed consent and negligence

Mole v. Jutton, et. al. -- 2004 WL 769790 (Md.) (April 13, 2004).

Tasha Mole, on advice from her personal doctor, consulted Dr. Jutton on how to proceed regarding cysts in her left breast. Mole and Dr. Jutton agreed to surgery and Mole consented to a procedure called "excision breast mass left." Consent to the procedure included any necessary extension of the surgery that Dr. Jutton, in the "exercise of professional judgement", deemed "necessary or advisable." During the procedure, some milk ducts were also cut. Jutton testified that "milk ducts get cut when you do incision."

Mole brought two claims against Jutton in the Circuit Court for Anne Arundel County. One claim was for medical negligence, the other for battery. The trial court declined to instruct the jury on the battery count. Mole was awarded \$22,5000 in damages on the negligence count, and challenged the ruling of the trial court on failure to give battery instructions.

On appeal, the threshold issue is whether the appellant's appeal was timely. The filing deadline for the appeal was April 19, 2002. The appellant mailed the notice to the post office address provided by the

Clerk's Office. Delivery to the Post Office Box occurred at 7:45 a.m. on April 19, 2002. The docket entry indicated that the notice was filed on April 22, 2002, at 9:55 a.m. The Court of Appeals explained that delivery of pleading or papers by the Postal Service to the address designated by the addressee is receipt by the addressee of those papers or pleadings. The court held that delivery to the Post Office Box constitutes actual delivery of that notice to the Clerk under Md. Rule 8-202.

The Court of Appeals explained the general rule that a claim under the informed consent doctrine must be pled as a tort action for negligence. A battery claim should be limited to those situations where the doctor performs a procedure to which the patient has not consented.

The court held that any claim that Jutton inadequately disclosed the potential risks associated with the procedure is one of negligence, not battery. Mole consented to the excision of the mass from her breast. The procedure is the one Dr. Jutton performed. The cutting of the milk ducts occurred during the course of this procedure. Failure to inform the patient that an incision close to the nipple area may result in the cutting of milk ducts is evidence of lack of informed consent.

Last clear chance doctrine

Carter v. Senate Masonry, Inc. -- 2004 WL 726861 (April 6, 2004).

Carter, a commercial plumber, brought a negligence action against a forklift operator's employer (Senate Masonry) after sustaining injury at a construction site. While installing plumbing, Carter walked over to a scaffolding to locate pipe fittings. Monteil, operating the forklift, delivered a cube of cinder block to the scaffold. While maneuvering to place a pan of mortar upon the cube of cinder blocks, he caused several blocks to fall, striking Carter. Carter testified that he should have been completely visible to Monteil. Monteil testified that he waited for Carter to move out of the way. An expert witness testified that Carter "put himself in a position of danger," but that Monteil increased the risk of injury by operating the forklift without a pallet. Carter, despite his own negligence, was awarded damages at trial, the jury finding that Monteil had the last clear chance to avoid the accident. The Circuit Court granted Senate's post-trial motion for a judgement notwithstanding the verdict ("JNOV").

The Court of Special Appeals held that whether Monteil had the "last clear chance" or final opportunity to avoid the accident was an issue for the jury. Last clear chance allows a contributorily negligent defendant to recover damages if three elements are satisfied: (1) the defendant is negligent, (2) the plaintiff is contributorily negligent, and (3) the plaintiff makes a showing of something new or sequential, which affords the defendant a *fresh opportunity* to avert the consequences of his original negligence. The theory rests on the premise that the plaintiff's negligence is not a proximate cause of the result.

The court emphasized the importance of sequential actions in a finding of last clear chance, and that concurrent negligent actions are not sufficient. The court concluded that the facts could have been read to show that Monteil was negligent, Carter was negligent, and that Monteil then had a new opportunity to change the course of events.

The dissenting opinion agreed that both Montiel and Carter were negligent; however, the dissent argued that Montiel's negligence consisted of only one act. Therefore, the negligent acts were concurrent. The concurring opinion explained that Maryland's requirement that the plaintiff must first prove that the defendant was negligent before the defendant had the last clear chance to avoid injuring the plaintiff was not part of the original last clear doctrine rule.

Recording of an easement

Beins v. Oden -- 843 A.2d 147, 2004 WL 2 (February 26, 2004).

The Beins are owners of property in Frederick, Maryland. The Odens and the Hoppes own property next to the Beins property. A restrictive covenant (easement) on the Beins property was recorded in the direct chain of title to the Oden and Hoppes property (dominant estate); however, the restrictive covenant was not recorded in the chain of title to the Beins property (servient estate). The issue for the court was whether this covenant is binding.

The Circuit Court granted summary judgment for the Odens; upholding and affirming the right of way traversing the Beins's property. The court found that the Beins purchased their property with knowledge of the easement and were therefore bound by it despite the fact that it was not recorded in their direct chain of title.

The Court of Appeals explained that implied notice of an easement is assumed once the easement has become part of the public record, in spite of a failure to record the easement in the direct chain of title. The Beins argued that the easement must be "properly" recorded, not just recorded. The court rejected this argument, distinguishing it from *Waicker v. Banegura*, 745 A.2d 419 (2000), cited by plaintiffs, since in *Waicker* the name in the recording had been mistaken. Here, the lawyer employed by the Beins could have discovered the easement had he properly conducted the investigation.

The court also held that the neighbor next to the dominant and servient estates had no right to access the easement since the language in the deed expressly stated use for the dominant estate.

Court of Special Appeals of Maryland Workers' compensation benefits and dependent children

Keystone Masonry v. Hernandez -- 2004 WL 829038 (April 19, 2004).

Mr. Elvis Rudis Hernandez, a citizen of El Salvador, arrived in the US and found work as a laborer at Keystone Masonry Corporation on March 30. On May 24, Hernandez was killed when a wall collapsed on him. Mr. Hernandez was the father of two children living in El Salvador. After his death, a third child was born, of which Hernandez was the father.

At a hearing before the Workers' Compensation Commission, the Commission ruled that the Hernandez children, in El Salvador, were not dependant upon their father and denied their claim for death benefits.

On appeal to the Circuit Court, a jury found that all three children were wholly dependent upon their father and the court entered a judgment for appellants.

The Court of Special Appeals affirmed the Circuit Court's decision. The court held that the evidence was sufficient to support a finding that the children were wholly dependent. The evidence was based on testimony by Fredis Hernandez (Hernandez' father), Dr. Manuel Orozco (an expert on family remittances and the economy of El Salvador), Oscar Florez (a courier), and Dorothy Hernandez (Hernandez' mother).

Hernandez's father testified that he witnessed his son give money to Florez for delivery to Hernandez' children. Dr. Manuel Orozco testified that the practice of sending cash by courier is common in El Salvador. Dorothea Hernandez testified that both Romero and Salmeron would pick up the money sent by Hernandez, and that she was unaware of any other source of income for the two mothers. Oscar Florez testified that he delivered \$250 to Dorothea Hernandez on three occasions.

The existence of financial assistance from other extended family members was not sufficient to overrule the findings of the Circuit Court. The Court of Special Appeals explained that the Court of Appeals had earlier ruled that so long as the assistance was not consequential, and was limited to temporary services

or minor benefits, compensation should not be denied.

The court also addressed the issue of housing, explaining that the Court of Appeals has ruled that total dependency can be found, even where shelter is not provided by the deceased worker.

The court also addressed the issue of total dependency of a posthumous child. The court held that a child born after the death of his father is a member of a class who would be entitled to dependency benefits under Workers' Compensation.

Contracts, Uninsured motorist coverage

State Farm v. Crisfulli -- 2004 WL 829077 (April 19, 2004).

A Toyota owned by Yoon Ko Myung (the Myung vehicle), drove into the back of a vehicle owned by Diana Crisfulli and driven by Trempe (the Crisfulli vehicle), propelling it into a third vehicle driven by James Hurst. The Myung vehicle was insured by Progressive Insurance Co. under a \$50,000 single limit liability policy. Payments were made to Trempe (\$28,451), Crisfulli(\$17,071), Nicholas/passenger (\$750), and Hurst (\$3,278) totaling \$50,000.

The Crisfulli vehicle was insured under a State Farm policy that included uninsured motorist (UM) coverage with limits of \$25,000 per person and \$50,000 per accident.

Trempe claimed UM benefits and State Farm refused to payment, arguing that the \$28,451 already received exceeds the \$25,000 per person limit.

For the purpose of finalizing judgment for appeal, Trempe and State Farm entered into a stipulation about damages concerning the breach of contract count against State Farm, and jointly requested the court to enter judgment in favor of Trempe for \$21,549. State Farm then filed an appeal.

On appeal, State Farm argued that the Myung vehicle was not an "uninsured motor vehicle" under the language of the State Farm UM provision and that even if the Myung vehicle is an "uninsured motor vehicle," that Tempe is not entitled to benefits.

The Court of Special Appeals held that individual recovery is limited to the per-person limit on UM recovery, not the per-accident limit of liability. Since the per-person limit was \$25,000 and Trempe had already received \$28,451, Trempe was not entitled to benefits.

Trademark case

Mid South Building Supply of Maryland, Inc. v. Guardian Door and Window, Inc. of Baltimore -- 2004 WL 816746 (April 16, 2004).

Mid South Building Supply of Maryland, Inc. ("Mid South") is a Maryland corporation involved in the selling of building supplies and materials. Guardian Door and Window, Inc. ("Guardian") is also a Maryland corporation in the business of manufacturing, selling, and installing doors, storm doors, and security door systems. Since 1996 Mid South had purchased security storm doors from Guilda, Inc. of Pennsylvania. Guilda makes storm doors under the name "Guardian Security Storm Doors." Mid South purchased 156 such doors from Guilda and sold the doors to customers.

Guardian obtained a certificate registering the trademark "Guardian Security Storm Door" on July 2, 1998 from the State of Maryland and on May 23, 2000 obtained a certificate registering the trademark "Genuine Guardian Security Storm Door" from the U.S. Patent and Trademark Office.

In April of 2000, Christopher Toler, the President of Guardian, met with Mid South's Vice President, Daniel Flynn, to inform Flynn of the infringement. On April 4, Flynn wrote to Toler, stating that he only

had 32 doors in stock at the Baltimore location and that he would sell only those 32 doors in exchange for continued business between the parties. On November 14, 2001, a private investigator for Guardian requested and purchased a Guardian Security Storm Door at Mid South's Baltimore location.

The Circuit Court for Prince George's County entered judgment for Guardian awarding treble damages of \$45,990.33.

The Court of Special Appeals affirmed the Circuit Court's ruling. The court explained that "while actual confusion is not necessary to a finding of likelihood of confusion, it is nevertheless the best evidence of likelihood of confusion." There was evidence of customer complaints about being able to purchase Guardian doors elsewhere at cheaper prices, and evidence of customer requests for repair or replacement based upon warranties on doors that had not been purchased from Guardian.

On damages, the Court held that under the Lanham Act, 15 U.S.C. § 1117(b), treble damages are permitted in the event of a willful infringement. The \$45,990.33 awarded by the Circuit Court was an amount equal to three times Mid South's profits (15,330.11 based on 30% markup). The court upheld the award for damages.

Constructive notice of crossing signal

Smith v. City of Baltimore -- 2004 WL 793559 (April 15, 2004).

Buster Holland was walking south on Caroline Street when he reached the intersection with Fayette Street. The pedestrian crossing signal was out of alignment and was facing east (instead of north so that Mr. Holland could see it). Mr. Holland, seeing the traffic signal for Caroline Street was green, proceeded across the intersection. The light turned red and Mr. Holland turned back. A westbound car in the southernmost lane on Fayette Street stopped to let Mr. Holland pass. A second car did not see Mr. Holland, and accelerated around the first car and struck Mr. Holland, injuring him critically.

In a survival action and a wrongful death action, the adult daughters of Mr. Holland filed suit, claiming the City had breached its duty to use reasonable care in maintaining the pedestrian crossing signal and that as a result, Mr. Holland was fatally injured.

The Circuit Court for Baltimore City granted summary judgment for the City on the basis of notice, explaining that since there was no evidence of how long the signal was misaligned, the plaintiff could not make the argument and impose upon the City constructive notice.

On appeal, the appellants argued that the City was obligated to conduct routine inspections in an effort to discover defects, and that failure to do so constituted constructive knowledge of the defects. The Court of Special Appeals affirmed the Circuit Court's ruling, holding that while the City has a duty to maintain its roadways, both the nature of the defect and the duration of time it has existed are important in determining whether there was constructive notice. The nature of a misaligned crossing signal is not such that one could infer that citizens would automatically report it. Additionally, there was no evidence the defect had existed for a sufficient amount of time.

Consumer protection and fraudulent concealment

Hogan v. Maryland State Dental Association -- 2004 WL 414833 (March 8, 2004).

Lisa Hogan and Victoria Bolton received dental fillings containing mercury. They brought a class action suit against the American Dental Association (ADA) and the Maryland State Dental Association (MSDA), Inc. They alleged unfair and deceptive trade practices under the Maryland Consumer Protection Act in count one, and alleged fraud in count two. The Circuit Court dismissed the complaint for failure to state a claim while also granting the ADA's motion to dismiss on the basis that the court

had no jurisdiction over it. Appellants did not challenge the ruling on ADA.

The Court of Appeals, in considering the issue, stated the issue to be whether dental patients who received dental fillings containing mercury have stated a legally cognizable claim against the State professional association for (1) violation of the Maryland Consumer Protection Act and (2) fraud.

The Court of Appeals held that the Maryland Consumer Protection Act was not intended to impose liability in such situations. The Court held that defendant was not a "merchant" under Commercial Law, section 13-101(g) since the defendant did not sell or offer to sell.

The Court also held that dental fillings are not "consumer goods" under Commercial Law, section 13-101(d) since they are not purchased by consumers as a good, but are selected and used by a practitioner as part of a professional service. The Court explained that the facts alleged come within an express exemption in the Act applicable to professional services of a "dental practitioner."

Concerning the fraud count (count two), the Court focused on fraudulent concealment since the allegations were of concealment practices. The Court explained that unless a special duty (such as in a confidential or fiduciary relationship) to disclose exists, non-disclosure does not constitute fraud.

The appellants did not allege facts establishing such a relationship.

The Court also held that expression of an opinion does not constitute fraud. Since appellant alleges existence of dispute over the safety of mercury (and not specific misrepresentation or concealment of fact), the MSDA's position on this dispute does not constitute fraud.

A minor's assumption of the risk

Tate v. Board of Education of Prince George's County -- 2004 WL 405914 (March 5, 2004).

In November 1999, Tanika Tate was a fifteen-year-old 10th grade student at Suitland High School. During the Thanksgiving holiday, her uncle-in-law, Kevin Shields, made sexual advances toward Tanika. On the following Monday, Shields called Tanika and told her that "he was going to get me from school . . . [S]o he could take me to his house and have sex with me." After lunch period, Tanika was called to the school's main office. An office staff member told Tanika that Shields was there "to get a key from me." Shields had tried to take Tanika from class but Ms. Garner, a secretary in the main office, informed Shields that parental permission was necessary to take Tanika from school grounds. After Tanika and Shields exchanged keys, Ms. Garner followed them to the main lobby where she watched Tanika walk in the direction of her class and watched Shields leave the building. At some point, Tanika left the building and traveled with Shields to his home. Despite Tanika's protests, they engaged in sexual acts, including intercourse, and Shields returned Tanika to school ten minutes before dismissal time. Shields was later charged, convicted, and sentenced to two years in prison.

Upon reaching the age of majority, Tate sued the Board of Education of Prince George's County. The Circuit Court for Prince George's County granted summary judgment for the defendant. The Circuit Court raised the doctrine of assumption of the risk as controlling. The court found that the plaintiff had several alternatives available to her and that she did not have to leave school with her uncle. Additionally, she had also been put on notice to her uncle's intentions. The court also distinguished this case from that of one under criminal law where assumption of the risk would not be applicable. Here, the claim was brought against a third party; therefore, assumption of the risk was applicable.

On appeal to the Court of Special Appeals, Tanika argued that because the act committed by Shields was a statutory strict liability crime (of which consent is not a defense), assumption of the risk should

not apply.

The Court explained that the issue of consent with underage victims in sexual act crimes is based on the societal notion that a child of tender years cannot comprehend the full effects of sexual activity. The court found no evidence of authority that the impediment to the defense of consent is applicable in civil court. The court also explained that the defense of assumption of the risk is available to defendants sued by minor plaintiffs since minors may assume the risk of their injuries.

The court also looked to other jurisdictions in addressing the issue of whether the voluntariness component of the defense of assumption of the risk in a civil action is negated as a matter of law (since the victim's consent is not a defense to the criminal offense of statutory rape). The weight of authority, the facts of the present case, and the lack of a constitutional provision prohibiting consent, led the court to hold that a minor's consent is relevant for purposes of determining civil liability.

**Circuit Court of Virginia, Fairfax County
Products Liability - 'Your Work' Exclusion**

Pulte Home Corp. v. Fidelity & Guaranty Ins. Co. -- 2004 WL 516216 (Feb. 6, 2004).

In 1998-1999, fifteen lawsuits were brought against Pulte Home Corp. ("Pulte") and one of its subcontractors, Coronado Corporation, for installing allegedly defective Exterior Insulation Finish Systems ("EIFS").

Fidelity & Guaranty Insurance Co. ("FGIC") and St. Paul Fire and Marine Insurance Co. ("St. Paul") did not respond to Pulte's selection of counsel, nor did they provide a defense. Pulte filed a motion for summary judgment against FGIC and St. Paul seeking a declaration that the terms of its policy, obligated FGIC to reimburse Pulte for its \$1,350,293.17 in expenses.

FGIC and St. Paul did not dispute that there was a duty owed under the policy; however, they did dispute the scope of the duty. Specifically, FGIC and St. Paul assert that the (1) total amount expended by Pulte, (2) the reasonableness of defense costs, and (3) other entity insurance coverage are all material disputed facts that cannot be decided as a matter of law.

The Court explained that although insurers who breach their duty to defend waive their rights to contest either coverage or the reasonableness of the *judgment amount*; however, insurers do not waive their rights to contest the reasonableness of *defense costs*. The court held that the amount and reasonableness of the *defense costs* to be material facts that could not be determined at summary judgment as a matter of law. The court also ruled that the total amount expended by Pulte was in dispute; therefore, could not be decided as a matter of law. The court denied Pulte's motion for summary judgment on reimbursement for Pulte's defense costs.

FGIC and St. Paul motioned for partial summary judgment regarding the duty to indemnify. They argued that (1) there is no indemnity coverage for repair or replacement of named insured's own work under the "your work" provision and (2) that defective workmanship is not an "occurrence" under the terms of the contract.

The Court held the "your work" exclusions to be unambiguous. The exclusion in the contract clearly excluded indemnity for repair or replacement of "your work" by the named insured. The court held that the exclusions extend to Pulte as the Additional Insured.

The Court granted FGIC and St. Paul's motion for partial summary judgment for the portions of the homes allocated to the repair and replacement of EIFS.

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