

# Recent Developments in the Law

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**Vol. No. LVII**

October, 2004

## **LETTER**

*October, 2004 Special Issue  
Copyright Awards*

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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### **Statute of Limitations and Occupational Deafness**

*Yox v. Tru-Rol Co.*-- 380 Md. 326, 844 A.2d 1151 (March 15, 2004).

**Statute of  
limitations  
clock starts  
ticking when  
the loss  
occurred and  
the injured had  
knowledge  
actual loss**

Mr. Yox worked for Tru-Rol Company, Inc. for over 47 years as a press operator. Throughout his employment he was exposed to loud noise. In September of 1997 Mr. Yox visited an ear, nose, and throat specialist. At the time, Yox had a 35.25% hearing loss in his right ear and 37.75% loss in his left ear. This amounted to a binaural loss of 35.67%, compensable under § 9-650.

In July 2000, after beginning work for a new employer, he returned to the Doctor; his hearing had worsened to 33% and 38%; however, when age was factored in, there was little or no change for compensation purposes. While continuing to work, Yox filed a worker's compensation claim against Tru-Rol for occupational disease due to years of exposure to loud noise. Tru-Rol raised a statute of limitations defense, and the Commission determined that the test was whether there was a disablement and whether Yox knew he had the disablement attributable to his employment. Answering in the affirmative, the Commission held that the claim was barred by the statute of limitations.

The Circuit Court reversed, concluding that because Yox had not lost any time from work and therefore suffered no wage loss or earning impairment, that the statute does not begin to run until the hearing loss gives rise to incapacity to work, as set forth in § 9-711 and § 9-502.

The Court of Special Appeals reversed the Circuit Court and the Court of Appeals granted certiorari to review.

The court explained that the 1967 statute provided a different definition of "disablement" in occupational hearing cases. In place of wage loss or impairment, it substituted the specific objective criteria for measuring compensable hearing loss. The court held that a claim must be filed within two years after the date when the employee (1) first suffered the requisite degree of hearing loss, and (2) first had actual knowledge that the disablement was caused by the employment. Since Mr. Yox suffered the disablement and had actual knowledge of it 13 years prior to filing his claim, the court held that his claim was properly rejected.

The dissent disagrees on the creation of a separate statute of limitations for occupational hearing loss. The dissent explains that other occupational disease claims begin to run at disablement under § 9-711 of the Worker's Compensation Act.

### **Timeliness of Filing Post-Judgment Motions**

*Tierco Maryland, Inc. v. Williams* - 2004 WL 1078135 (May 14, 2004).

Amusement park patrons brought action against park (Six Flags) alleging assault, battery, false imprisonment, and negligent supervision, after an altercation occurred between patrons and ride operators because the ride operators would not let the Williams' granddaughter get on the ride alleging that she was too short.

The case was brought on appeal by the petitioners who alleged that the Court of Special Appeals erroneously dismissed their appeal as untimely under the Maryland Rules.

Before the trial, on October 29, 2001, one of the plaintiffs who was not involved in the altercation was voluntarily dismissed by the plaintiffs' attorney which was acknowledged in open court by the trial judge and the defending attorneys. The jury verdict came back on October 21, 2001 but there was a delay in the judgment because there was confusion as to who the correct defendant was. The plaintiffs submitted a signed judgment on February 15, 2002 and it was entered into the docket on February 21, 2002. The defendants filed a motion for judgment notwithstanding the verdict pursuant to Maryland Rule 2-532, which the trial court partially granted by vacating the punitive damages.

The two issues were (1) is the motion for judgment notwithstanding verdict null because it was filed before the voluntary dismissal order was entered on the docket and (2) is an appeal of the trial court's judgment notwithstanding the verdict untimely because a final judgment had not been rendered?

The Court of Appeals held that there was no final judgment as of March 4, 2002, when the amended motion was filed. However, the court disagreed with the argument that lack of a final judgment as to all

claims of all parties made nullities of the defendant's motion notwithstanding the verdict and the trial court's partial grant thereof.

The Court held that a "post judgment motion may be filed within 10 days of the judgment or judgments it seeks to alter or upset, which judgment or judgments might not be the final judgment in the case." Therefore, the judgments the defendant's post-trial motions were directed at were those based on the jury verdict which was entered on February 21, 2002. The defendant's filing of the motion was within the 10-day limit.

Furthermore, the defendant argued that the acknowledgment in open court of the voluntary dismissal before the trial made it final. The Court held that it was governed by Maryland Rule 2-601 where a judgment is an order final in its nature. The voluntary dismissal was such an order. Therefore there could be no final judgment in the case unless there was a written record in the case file and a docket entry of the voluntary dismissal.

The plaintiffs, on appeal, argued that a civil post-judgment motion may not be filed before all claims are reduced to a final judgment; therefore, the defendant's post-judgment motion is invalid. They relied on *Atlantic Food and Beverage Systems, Inc. v. Annapolis* whose holding the Court clarified to be that the post-judgment in that case was filed prematurely because it sought to alter or amend a judgment that had not been entered at the time the motion was filed. The Court further held in this case that the plain language in the rules governing post-judgment motions (MD rules 2-532, 2-533 and 2-534) the word judgment means the judgment on the particular claim that is the object of the post-judgment motion. Therefore, entry of a final judgment as to all claims of all parties in a civil case is not necessarily a requirement for the filing of a post-judgment motion.

The case was remanded because in the complaint and before the trial there were no formal allegations of racial discrimination. The Court felt that the case, as presented to the jury, was as much about alleged race discrimination as it was about the other charges. The Court held that the trial court abused its discretion by not granting a new trial or curbing comments during the trial even though there were no objections by the defendant's counsel and the issue was not brought up on appeal.

The Court also noted that due to the confusion about who the proper defendant was at the conclusion of the trial, that it was important for the new trial court to note that the defendant was entitled to have all facts related to civil liability decided by a jury including the employer-employee relationship.

The dissent took issue with the court remanding the case based on their holding that the trial court abused its discretion by not granting a new trial. The dissenting judge based his objection on the fact that the holding did not provide an incentive to bring objections to the judge, it went against judicial efficiency and public policy, it did not provide a bright line rule for judges, and it was based on appellate fact-finding, which is cold facts, whereas the trial judge is more intimately involved with the case.

### **Competency of Child Witness**

*Perry v. State* -- 2004 WL 982026 (May 7, 2004).

On May 4, 2001, Kenneth D. Perry was convicted of first and second degree murder. On December 11, 2003, the court granted certiorari on the issue of whether the trial court was required to hold a separate voir dire hearing, outside the presence of the jury, to determine if a seven-year-old child is competent to testify.

Jewel (age four at the time), witnessed the shooting and told rescuers she knew who had killed her mother. At trial, the State called Jewel as a witness (seven-years-old at the time of trial). Defense

counsel approached the bench and asked the court to voir dire the child outside the presence of the jury and she identified Perry as the man who had killed her mother. The court held that the determination of a child's competency to testify is within the judgment and discretion of the trial judge. The court explained that the judgement of the trial judge is not to be disturbed on appeal in the absence of an abuse of discretion. The trial court should determine a child's capacity to observe, understand, recall, and relate happenings while understanding the duty to speak the truth. The court also explained that the burden is on the opposing party to present a substantial question regarding competency before the trial court should require voir dire of any witness.

### **Personal Injury Protection Benefits**

*Nesbit v. Gov't Employees Ins. Co.* -- 2004 WL 1635606 (July 23, 2004).

Richard Nesbit ("Nesbit") brought an action against his automobile insurance carrier, Government Employees Insurance Company ("GEICO"), to recover personal injury protection (PIP) benefits. The Court of Appeals held that (1) the insured's agreement that the waiver of PIP benefits remained effective, unless the insured notified the insurer in writing, was valid, and thus, the PIP waiver remained effective despite renewals and alleged policy changes, and (2) the waiver form complied with statutory requirements.

On February 7, 2004, Nesbit was injured in an automobile accident. Nesbit attempted to recover PIP benefits from GEICO; however, GEICO rejected the claim based on a waiver signed by Nesbit on June 15, 1998. At the time of the accident, Nesbit was covered under a renewal policy and the automobiles owned by Nesbit were different.

Nesbit alleged that Section 19-506 (e) of the Insurance Code invalidates a PIP waiver, that the waiver signed by Nesbit did not comply with § 19-506 (d), and that GEICO's failure to produce the entire document was not sufficient evidence to establish that Nesbit had signed a valid waiver of PIP benefits.

Nesbit argued that since § 19-506(e) only specifically mentioned waivers made by those who are insured continuously by the Maryland Automobile Insurance Fund ("MAIF"), waivers made by people covered continuously by other insurance companies do not remain effective until withdrawn in writing. If the policy changed in some respect, Nesbit argued, that waiver should cease to be effective. The court disagreed, ruling that there was nothing in the statutory language or history to suggest that waivers entered into with "other insurers" are invalid.

The court explained that although the language of § 19-506(e) of the statute only mentions MAIF; to interpret this silence regarding other insurers in accordance with Nesbit's contention was illogical. The court applied a "commonsensical" approach in reasoning that to assume a waiver would become ineffective in some way other than when it was withdrawn in writing was not reasonable since the statute makes no mention of how this might occur. The court also looked to the legislative history of § 19-506 of the Insurance Code. The legislative history provided evidence that the Legislature passed the predecessor to 19-506 for the purpose of allowing MAIF to operate as if waivers of PIP benefits remained effective until they had been affirmatively withdrawn by the insured, as other insurance companies had already been doing.

The court disagreed with Nesbit's second contention that the waiver form did not comply with § 19-506(d) of the Insurance Article. The court explained that the form contained adequate detail and proper information and that it had been approved by the Maryland Insurance Commissioner.

Finally, the court held that GEICO's production of only the final page containing Nesbit's signature was adequate to establish that Nesbit had signed a valid PIP waiver.

### **Collateral Evidence Rule**

*Haischer v. CSX* -- 2004 WL 982137 A.2d 147, 2004 WL 2 (May 7, 2004).

A Railroad engineer brought an action against a railroad under the Boiler Inspection Act for permanent injuries sustained when his shoulder struck an unhinged door of an air pressure monitoring device. The Circuit Court of Baltimore City entered judgment in favor of the engineer and the Court of Special Appeals affirmed as to liability but reversed and remanded on the issue of damages.

CSX wanted evidence of the engineer's (Haischer) receipt of at least \$2,320/month from the Railroad Retirement Board communicated to the jury. CSX also believed that Haischer's testimony constituted malingering and an indication of financial distress.

The court explained that the collateral source rule permits an injured person to recover the full amount of his or her provable damages, "regardless of the amount of compensation which the person has received for his injuries from sources unrelated to the tortfeasor." *Motor Vehicle Admin. v. Seidel*, 326 Md. 237, 253, 604 A.2d 473, 481 (1992).

The court stated that the principle underlying the Supreme Court decision in *Eichel v. New York Cent. R.R. Co.*, 375 U.S. 253 was entirely consistent with that underlying Maryland's adoption of the collateral source rule, and held that evidence of a plaintiff's receipt of Railroad Retirement benefits is ordinarily inadmissible to show possible malingering on the part of the plaintiff.

The court recognized that there are certain limited exceptions to the inadmissibility rule. Evidence to rebut a claim that someone is in financial distress due to the injury is one such example. The court held, however, that in this case, Haischer's testimony did not reach that level.

### **Riparian Rights Regarding Blinds Sites for Hunting**

*Worton Creek Marina v. Claggett* - 2004 WL 1237445 (June 7, 2004).

The Marinas (the petitioners) were beneficiaries of a "grandfather" provision of the Kent County Code that permitted group moorings that were in existence prior to July 1, 1980 to continue to exist outside of their extended property lines. Some of the boat moorings maintained by the petitioners were located within Mr. Claggett's extended property line. Mr. Claggett was an avid waterfowl hunter who had licensed his shoreline for that purpose pursuant to Md. Code (1973, 2000 Repl. Vol.) §§ 10-607 to 10-609 of the Natural Resources Article. Mr. Claggett, in accordance with his license, established stationary blinds and off-shore blinds located within his extended property line for use in the 2000-01 hunting season. As a result, Mr. Claggett asked the petitioners to remove all boats moored within his extended property line area by the start date of open waterfowl hunting season (September 1, 2000). At issue in this case was a Kent County Statute which prior to August 17, 2001, required that "moorings in waterfowl-blind areas shall be cleared of boats."

In regards to the local statutory provision the Court held that the amended ordinance permitted an activity that was prohibited by the State program; it allowed the mooring of boats in waters that for two months of the year infringed upon the rights of neighboring riparian rights property owners.

Furthermore, a local ordinance is preempted when it either prohibits an act that under State law is permitted, or it permits an act that under State law is prohibited. In this case, the State law preempted the local ordinance because the local law permitted an activity that state law prohibited; therefore the local ordinance was void. The court disavowed the appellate court's use of the federal doctrine of conflict by frustration of purpose, which says state law will be preempted when congress intends to occupy the field. The Court declined to address its applicability to Maryland conflict law in general because no state has applied the doctrine to resolve conflicts between state and local law.

## **Public Immunity Dispensed with on Motion for Summary Judgment**

*Hines v. French* - 2004 WL 1487584 (July 2, 2004).

Plaintiff Mary Anne Hines was driving home in Harford County returning from a party in Baltimore City. As she was driving home, the Baltimore County 911 dispatch issued a "be on the lookout" for a car that was the same as the Plaintiff's, including the tag number of the Plaintiff's vehicle. The vehicle was allegedly involved in a hit-and-run. The parties' version of the events diverge into two conflicting accounts of the traffic stop and the subsequent arrest. Deputy French responded to the dispatch call and began to pursue the Plaintiff. Deputy French, who was not in uniform, allegedly approached the Plaintiff's car with his gun pointed at her and ordered her to exit the truck. When she exited the truck, the deputy noticed that she had scars from recent surgery on her jaw.

He then grabbed her and slammed her head into the truck. He then allegedly proceeded to pull her crippled arm behind her back and hand cuffed it tightly causing her to suffer lacerations on her wrists and hands. The deputy inspected the vehicle but was irritated when he could not find any damage to the vehicle. The Plaintiff was asked to submit to a breath test and results indicated that there was no use of alcohol. The Plaintiff was taken to the Police Station and was issued three citations after it was determined that she was not involved in the hit-and-run accident.

The Plaintiff and her husband returned to the police station two days later to lodge an internal complaint against Deputy French but when they spoke to Sergeant Vernon (he was assigned to the Harford County Sheriff Department's Internal Affairs division) he refused to take their complaint.

On December 14, 1998, proceedings were conducted in the District Court of Maryland regarding the Plaintiff's three traffic violations. Pursuant to an agreement between the appellant and the prosecutor, the charge of eluding the police was placed on the stet docket, a *nolle prosequi* was entered on the negligent driving charge, and a not guilty agreed statement of facts was presented on the charge of failure to drive in designated lane. Based on the not guilty agreed statement of facts, the district court found appellant guilty of failure to drive in designated lane.

The plaintiff filed an eight-count complaint in the Circuit Court for Harford County against defendants Deputy Sheriff John French, Sheriff Joseph Meadows, and Sergeant Gary Vernon of the Harford County Sheriff's Department, Harford County, the State of Maryland, Baltimore County 911 dispatcher Jane Doe, Chief Terrence Sheridan of the Baltimore County Police Department, the Baltimore County Police Department and Baltimore County. The Plaintiffs alleged assault, battery, false imprisonment, false arrest, malicious prosecution, intentional infliction of emotional distress, negligence and loss of consortium. Following the trial court's granting of appellee's various motions to dismiss and for Summary Judgment, Plaintiffs filed an appeal.

**Immunity for State  
personnel is waived for  
tortious acts  
committed with malice.**

Count Seven of the Plaintiffs' complaint included Deputy French, Sheriff Meadows, Sergeant Vernon, Harford County, Jane Doe, Chief Sheridan, BCPD, Baltimore County, and Maryland. Summary Judgment was granted for Deputy French, Sheriff Meadows, and Sergeant Vernon because Sergeant Vernon and Deputy French were protected by the umbrella of public official immunity. *The court granted the motions to dismiss of chief Sheridan and Baltimore County, thereby dismissing Jane Doe, chief Sheridan, and Baltimore County. Finally the BCPD and Maryland were dismissed as well.*

Under Common Law immunity, public officials are entitled to qualified immunity from negligence claims. Thus a government representative of the State of Maryland is relieved of liability for his [or her] negligent acts. The requirements for Common Law immunity are: (1) the individual actor must be a public official rather than a mere government employee or agent; and (2) his tortious conduct occurred while he [or she] was performing discretionary, as opposed to ministerial acts in furtherance of his [or her] official duties. If these two elements are met then a qualified immunity attaches so long as **there is an absence of malice**.

In addition to common law immunity, the General Assembly has enacted the Maryland Tort Claims Act (MTCA) which has broadened the qualified immunity coverage to include all State personnel. Moreover, although the MTCA continued to grant qualified immunity to State personnel against negligence claims, it expanded coverage to all types of tort claims, including constitutional and intentional torts.

The MTCA allows for **State Immunity** to be waived in circumstances including "*any tortious act or omission of State personnel that: (i) is not within the scope of public duties of the State personnel; or (ii) is made with malice or gross negligence*". State personnel, on the other hand, are immune from suits only for *tortious acts or omissions that are within the scope of the public duties of the State personnel and are made without malice or gross negligence*. Thus, it is a jury question to determine whether the state personnel acted with malice or gross negligence.

#### **Expert's Certificates Fail in Medical Malpractice Case**

*D'Angelo v. St. Agnes Healthcare* -- 2004 WL 1574801 (July 15, 2004).

In November 1998 Vincent D'Angelo began suffering severe headaches. Between January 13, 1999 and June 14, 1999, D'Angelo was treated by agents of St. Agnes Healthcare, Inc. and/or St. Agnes Community Care Center. CT scans were read as normal despite D'Angelo's symptoms suggestive of an ongoing infectious process in his sinus cavity. On June 15, 1999, D'Angelo had another CT scan performed which showed that an infectious mass had penetrated the sinus cavity and invaded the brain. He had a craniotomy on June 16, 1999 and suffered severe headaches, blindness, and other severe health problems until his death on March 6, 2001.

The allegations in the Plaintiff's statement of claims against twenty-nine doctors, St. Agnes Health Care, Inc., and Sterling Professional Emergency Physicians, LLC were general in nature.

The judge signed an order dismissing the case as to all remaining defendants due to Plaintiff's failure to file "a certificate of qualified merit that complies with 3-2A- 04(b)(1) of the Courts and Judicial Proceedings Article." The case was appealed to The Court of Special Appeals of Maryland.

The Maryland Health Claims Malpractice Act (the Act) requires arbitration as a precondition to any medical negligence suit in circuit court. The claimant must file a certificate of a qualified expert within ninety days of the filing of the statement of claims and "a report of the attesting expert."

Plaintiff contended that the expert's certificate need not name the licensed professional against whom the claims were brought. The Court of Appeals rejected this claim based on prior decisions interpreting the certificate requirement.

The court also rejected the plaintiff's contention that St. Agnes Healthcare, Inc. was included in the claim. St. Agnes Healthcare was not named specifically in either of the certificates.

Finally, the court rejected the appellant's contention that the claims should not have been dismissed because the record shows that the appellants "attempted to arbitrate their claim in good faith and in

accordance with the Act."

The court disagreed that the claims were made in good faith. The depositions of the expert witnesses disclosed that the experts signed the certificates without any idea who the attorney intended to sue. Discovery also revealed that almost all of the appellees were sued even though no doctor had ever expressed the view that they had deviated from the appropriate standard of care. Even ten months after the complaint had been filed, the appellant's attorney still could not explain how many of the remaining twenty-five defendants had acted negligently. The court ruled that this was not within the "letter" or "spirit" of the certificate agreement.

Assuming the claims had been made in good faith, the court also rejected the argument that proof of good faith would warrant a reversal. The court referred to *Watts v. King*, 143 Md.App. 293, 794 A.2d 723.

### **Reduction in Award for Attorney Fees was Reversed**

*Flaa v. Manor Country Club* - 2004 WL 1977591 (Sept. 8, 2004).

The Court of Special Appeals held that an 89% reduction in attorney fees was not supported by reasonable rationale.

### **Lodestar approach must be used in calculating attorney's fees**

Attorney's fees were awarded in a discrimination case. The award of the attorney's fees resulted in two petitions for judicial review by the Circuit Court for Montgomery County, MD. In the first petition, the appellant challenged the \$3,000.00 award that the Montgomery County Public Accommodation Panel (Panel) granted to her. The Circuit Court remanded the decision to the Panel and instructed the Panel to calculate reasonable attorney's fees as set forth in the county code. The Panel then awarded the appellant \$22, 440.00. Again, appellant filed a petition for judicial review. The court affirmed the award of \$22,440.00 for attorney's fees to the appellant. Appellant then appealed to the Court of Special Appeals and argued that the circuit court's affirmation of the award was invalid as the Panel failed to use the lodestar method in its analysis.

In the original discrimination case, the parties appeared before a hearing examiner and the public hearing lasted for ten days. The hearing examiner recommended awarding the appellant \$1,000.00 in damages and \$4,282.31 in expenses and \$120,481.00 in attorney's fees. The Panel disagreed with the hearing examiner and as a result awarded appellants \$3,000.00 in attorney's fees and \$750.00 in damages. On appeal, the circuit court stated that the Panel erred in calculating attorney's fees because the panel did not apply the factors provided in Montgomery County Code 27-7(k)(1) (1987) and failed to refute the hearing examiner's findings that supported the recommendation of \$120,481.00 for attorney's fees.

The appellant stated that the Panel decision should be overturned because the Panel failed to use the lodestar analysis. The lodestar analysis begins by multiplying "the number of hours reasonably expended on the litigation by a reasonable hourly rate." "[R]eductions should be made for time that was not 'reasonably expended' which includes hours that are "excessive, redundant, or otherwise unnecessary." Further reductions are allowed by the court if "documentation of hours is inadequate." After the initial lodestar analysis is determined, the next step in calculating attorney's fees is to consider the 12 factors described in *Hensley*.

After a decision on attorney's fees has been made, the trial court awarding such fees should articulate clearly the rationale behind the award as to allow for 'meaningful review.' Further, the court reasoned that attorney's fees "may not [be] reduce[d] . . . by a particular percentage or amount (albeit justifiable reasons) in an arbitrary or indiscriminate fashion."

The court stated that the Panel failed to articulate how the decision on attorney's fees were made and that there was no evidence that the Panel used the lodestar calculation in the analysis. As a result, the circuit court remanded the matter with instructions to (1) use the lodestar approach in the calculation for attorney's fees and to (2) "provide an explanation for any disallowed hours."

