

# Recent Developments in the Law

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**Vol. No. LX**

March 2005

## LETTER

*March 2005 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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## *Recent Developments in the Law*

Jeffrey R. Schmieler, Esquire  
Saunders & Schmieler, P.C.  
8737 Colesville Road  
Suite L-200  
Silver Spring, Maryland 20910  
(301) 588-7717  
[www.sslawfirm.com](http://www.sslawfirm.com)

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## MARYLAND COURT OF APPEALS

### **Appropriateness of Declaratory Judgment -**

*Converge Services Group, L.L.C. v. Curran*, 2004 WL 2496150 (Nov. 8, 2004).

**Holding:** Under the doctrine of primary jurisdiction, it was appropriate for the circuit court to dismiss an action brought by an issuer of a surety bond seeking a declaratory judgment that its product, which was for use by residential tenants in lieu of security deposits, did not violate state law.

**Case Summary:** SureDeposit, Inc. ("SureDeposit") marketed and sold a "surety bond product" to Maryland residential real estate tenants. Tenants purchased the surety bonds at the beginning of tenancy and paid a premium to their landlords. The landlords collected the premium and forwarded it to SureDeposit. SureDeposit retained a portion of the premium as profit while allocating a portion of it to a "primary claims pool" to satisfy damage claims filed by landlords. Another portion was returned to the landlords to compensate them for their administrative expenses.

In 2002, the Consumer Protection Division of the Office of the Maryland Attorney General ("Division") commenced an investigation of SureDeposit for its marketing and sale of the surety bond. The Division

believed SureDeposit's trade practices violated the Maryland Consumer Protection Act ("CPA") and the Maryland Security Deposit Law and Application Fee Law ("SDL").

Upon facing a potential contested administrative process, SureDeposit filed a complaint in circuit court seeking declaratory relief that the SDL did not apply to its surety bond and that it had not violated the CPA.

Over a month later, the Division filed an administrative statement of charges against SureDeposit, alleging violations of the CPA and SDL. Further, the Division moved for dismissal of SureDeposit's circuit court complaint on the basis that the declaratory judgments sought would not fully resolve the controversy and that the Division, which had expertise with regard to administering and interpreting the CPA, exercised primary jurisdiction over the entire dispute.

The circuit court dismissed SureDeposit's complaint. The Court of Appeals issued a writ of certiorari on its own initiative and upheld the circuit court's decision. It stated that when a trial court is faced with a request for a judicial remedy such as a declaratory judgment in a situation where a related administrative agency action is pending, it usually has three possible courses of action.

**A court usually has three possible courses of action when faced with a request for a declaratory judgment when an administrative action is already pending**

First, the court may defer wholly to the administrative regulatory scheme and terminate the petition or complaint. Second, the court may stay its consideration of the invoked judicial remedy and await the result of the administrative proceedings before addressing the appropriateness of the relief sought in the litigation. Third, the court may exercise its discretion, if appropriate to do so, and provide a judicial remedy in advance of final action in the administrative proceeding.

The Court of Appeals found that it was proper for the trial court to hold that more effective relief could and should be obtained through the administrative procedure initiated by the Division. This was because a declaratory judgment in favor of SureDeposit on the SDL claims will not necessarily terminate the CPA claims and SureDeposit can always seek judicial review of any holding by the Division.

**Estates & Trusts, Right of First Refusal and the Rule Against Perpetuities -**  
*Arundel Corp. v. Marie*, 2004 WL 2514781 (Nov. 9, 2004).

**Holding:** A right of first refusal, which is void under the common law rule against perpetuities, is also void under § 11-103 of the Maryland Estates and Trusts Article.

**Case Summary:** On July 28, 1960, Camille and Mary Marie conveyed a parcel of land in Baltimore County to the Arundel Corporation ("Arundel"). The Maries agreed that whenever they or their heirs, executors, administrators or assigns decided to sell that parcel, they would first offer it to Arundel, its successors and assigns, for a price of \$2,250 per acre.

On November 22, 2002, Camille, having survived his wife Mary, died intestate. Their children were appointed as personal representatives for the estate. On September 8, 2003, the personal representatives wrote a letter advising Arundel that, in their view, the right of first refusal was void under the rule

against perpetuities. They asked that Arundel give up its claim of interest in the parcel.

Arundel refused to disclaim its interest. Arundel filed suit in circuit court and argued that the right of first refusal had vested and was enforceable. Even if the right was void under the common law rule against perpetuities, the common law rule had been abrogated by § 11-103 and the vesting of the right was in conformance with the statute.

The circuit court held that the right of first refusal was void under the common law rule and was not saved under the plain language of the statute. Arundel appealed and the Court of Appeals granted certiorari on its own initiative. On appeal, Arundel conceded that the traditional common law rule against perpetuities invalidated the right of first refusal.

The Court of Appeals went into a lengthy discussion of the legislative history regarding the rule against perpetuities and also looked to other jurisdictions such as Massachusetts and Pennsylvania. It found that in passing § 11-103, the Maryland General Assembly had opted for a limited "wait and see" approach to the rule against perpetuities, similar to the one developed in Massachusetts. Maryland elected to modify the strict common law rule and apply a "wait and see" rule only when the interest in question could not vest prior to the end of a life estate or a life in being.

The court found that the problem for Arundel was that the right of first refusal was not limited to vest at the end of any life estate or any life in being. It stated that the Maries could have elected to sell the property, triggering the right of first refusal, at any time during their lives or the life of the survivor of them. Thus the right was not saved by the statute.

#### **Insurance, Potentiality of Coverage/Duty to Defend -**

*Montgomery County Board of Education v. Horace Mann Ins. Co.*, 2004 WL 2533234 (Nov. 11, 2004).

**Holding:** There was a potentiality of coverage for a claim against a teacher for alleged sexual abuse. Therefore the school board had a duty to defend the teacher against the claim.

**Case Summary:** In February 1998, a former student using the name John Doe, filed suit against Barbara Robbins, his former teacher. Doe claimed that while he was a student at the school, Robbins abused her professional relationship with him in a variety of ways, including having a sexual relationship with him.

Robbins demanded that the school board, which was part of a self-insurance program, defend her in Doe's action. The school board concluded that she was being sued for actions "outside the scope of her employ" and refused to provide her with counsel or indemnification.

The Horace Mann Insurance Company ("Horace Mann"), ended up defending Robbins pursuant to an Educators Employment Liability Policy that it issued to the Maryland State Teachers Association. Horace Mann settled the claim for \$15,000 and then filed an action in the circuit court seeking reimbursement from the school board for the cost of defense and settlement.

**When there is a  
potentiality of coverage  
for a claim, the insurer  
has a duty to defend**

The circuit court determined that there was a potentiality of coverage for Robbins under the school board's self insurance and held that the school board had a duty to defend the action, that it breached its

duty, and that it must reimburse Horace Mann. The Court of Special Appeals affirmed.

The school board argued that the teacher had to pass a two part test to establish the potentiality of a claim. First, the teacher had to establish that there was a potentiality that the conduct at issue was undertaken in the performance of her duties, was within her scope of employment, and was without malice. Secondly, the school board must determine that the teacher was acting within his/her authorized capacity in the incident.

The school board's position was that Doe's complaint was based entirely on the claim that he was sexually assaulted by Robbins, that there was no insurance coverage for such conduct because it cannot be regarded as committed within the scope of her employment and that her mere denial that the conduct occurred was insufficient to create even a potentiality of coverage.

Horace Mann argued that the complaint alleged more than just sexual abuse, that the extrinsic evidence showed other potentially actionable conduct on Robbins' part and as a result, there was a potentiality of coverage and the school board had a statutory duty to defend.

In rejecting the school board's argument outlined above, the Court of Appeals held that Robbins only needed to establish that there was a potentiality that the conduct at issue was undertaken in the performance of her duties, was within her scope of employment, and was without malice. The court could not "imagine any circumstance in which the board could properly conclude that the employee was not acting in an authorized capacity if the employee was acting in the performance of his/her duties, within the scope of his/her employment, and without malice."

In affirming the lower courts' decisions, the Court of Appeals found that "there was more alleged and discovered here, both in the complaint and in the available extrinsic evidence, than simply sexual abuse, and that is what dooms the board's position." The court pointed to the fact that Counts I and III of Doe's complaint, though focusing on the sexual abuse, claimed injuries suffered as a direct and proximate result "of Defendants' actions and/or omissions," which could potentially be construed to include non-sexual conduct that was set forth in Doe's Preliminary Statement and Summary of Action.

Therefore, the Court of Appeals found it clear that there was a potentiality of coverage for Robbins and that there was a duty on the school board's part to defend the entire action.

#### **Constitutional Law - Right to a Jury Trial -**

*Davis v. Slater*, 2004 WL 2578440 (Nov. 15, 2004).

**Holding:** Under Articles 5 and 23 of the Maryland Declaration of Rights, a defendant who properly demands a jury trial is entitled to one even if the amount in controversy is \$10,000 or less.

**Once a jury trial is properly demanded, it cannot be withdrawn without the consent of all parties**

**Case Summary:** On Monday, July 26, 1999, Patricia Slater collided with a car driven by Jimmy Davis. On May 29, 2001, Davis filed a complaint in district court, requesting \$25,000 in damages and the costs of maintaining the action. Slater filed her answer and properly elected a jury trial. The district court then transferred the action to circuit court.

On February 11, 2003, Davis filed an amended complaint reducing his demand to \$10,000. Two days

later, he filed a Motion to Strike Jury Demand and Request for Hearing. The circuit court denied Davis' motion without a hearing. Davis renewed his Motion to Strike Jury Trial again at the beginning of trial and at the close of evidence. The circuit court denied it both times. The jury returned a verdict in favor of Davis in the amount of \$727.03 plus interest and costs.

Davis noted an appeal and the Court of Appeals issued a writ of certiorari on its own initiative. Davis argued on appeal that when he reduced the amount in controversy from \$25,000 to \$10,000, his action divested Slater of her entitlement to a jury trial. Slater argued that under Rules 2-325(f) and 2-327(a)(2) of the Maryland Rules of Civil Procedure, once a party has properly elected a jury trial in a civil case, all parties must consent to waive the entitlement to a jury trial for the case to be heard by the court rather than the jury.

The Court of Appeals examined the historical backdrop of the right to a jury trial. The court found that Article 23 of the Maryland Declaration of Rights cannot be interpreted as changing the entitlement to a jury trial at common law. Rather, it held that Article 23 carves out a segment of the cases in which a trial by jury can be elected without infringement by the legislature.

The Court of Appeals stated that the General Assembly had failed to limit the entitlement to a jury trial in circuit court civil cases where the amount in controversy is less than the \$10,000 amount in controversy contained in Article 23 of the Declaration of Rights. Therefore, where a jury trial is properly demanded by a party (as was the case with Slater), such demand may only be withdrawn with the consent of all parties to the litigation not in default pursuant to Rule 2-325(f).

Therefore, the Court of Appeals affirmed the circuit court's decision to deny Davis' Motion to Strike Jury Demand.

#### **Estates and Trusts, Rule Against Perpetuities -**

*Selig v. State Highway Administration*, 2004 WL 2583953 (Nov. 16, 2004).

**Holding:** The Rule against Perpetuities did not apply to a right of first refusal clause in the contract. Additionally the fact that the State Highway Administration used a portion of the deeded property did not preclude reacquisition of the remaining unused property under the right of first refusal clause.

**Case Summary:** On July 6, 1978, Milton Selig, the deceased husband of the plaintiff, Helene Selig, executed an option contract with the State Highway Administration ("SHA") to convey a parcel of land in exchange for \$700,000. The option was exercised and on October 20, 1978 the deed conveying the property to the SHA was executed and recorded.

There was a right of first refusal clause in the option contract. The clause provided that Mr. Selig or his successor in interest had the right to reacquire from the SHA the property conveyed if the SHA abandoned the project for which it had acquired the property and the Maryland Secretary of Transportation determined that the property was no longer needed for any transportation purpose. The language of the clause tracked the wording of § 8-309(b) of the 1977 Maryland Transportation Code.

The SHA ended up using less than three quarters of an acre of the conveyed property, leaving over 4 acres of the original conveyance unused. In February 2003, the SHA advertised that it would conduct an auction of the remaining unused acres on February 24, 2003. Mrs. Selig, although not personally served with notice of the auction, notified the SHA of her desire to exercise the estate of her husband's first right to reacquire the property. She tendered a check for \$700,000.

The SHA conducted its auction as scheduled and sold the property to a third party for \$1.8 million. Later, on March 10, 2003, the SHA notified Mrs. Selig that she had no right to reacquire the remaining

property and returned her check.

**Using only a portion  
of a deeded property  
does not preclude a  
party from re-acquiring  
the unused portion under  
a right of first refusal  
clause**

Mrs. Selig, as executrix of the estate of her deceased husband filed suit against the SHA, seeking to enforce the right of first refusal clause. The SHA, without filing an answer, filed a motion to dismiss.

The SHA made three arguments. First, it argued that the absence of a date by which the contract's right of first refusal must vest violated the Rule against Perpetuities and rendered Mrs. Selig's right to reacquire the property void and unenforceable.

Second, the SHA argued that because the right had not vested in 1978, it was extinguished by the subsequent repeal and reenactments of § 8-309(b) of the Transportation Article.

Finally, the SHA argued that even if the clause were preserved as being statutorily exempt from the Rule against Perpetuities, Mrs. Selig's right of first refusal could not apply to a "remnant" of the original parcel, but could only apply to the original conveyance in its entirety.

The circuit court granted the SHA's motion to dismiss on the grounds that the first refusal clause violated the Rule against Perpetuities. The Court of Appeals, on its own initiative issued a writ of certiorari.

The Court of Appeals reversed the circuit court's decision. It held that § 8-309 of the 1977 Maryland Transportation Article created a statutory exception to the Rule Against Perpetuities. The Court of Appeals determined that the contract's language, which created a contractual right of first refusal that echoed the statutory language, was not rendered void by the lack of a specified period within which the conditions precedent must occur. Further, the repealed and re-enacted versions of § 8-309 subsequent to the date of the contract's formation were to apply prospectively.

Finally, the Court of Appeals held that the fact that the SHA used a portion of the deeded property did not preclude Mrs. Selig from re-acquiring the remaining unused property under the right of first refusal clause.

**Governmental Immunity -**

*Livesay v. Baltimore County*, 2004 WL 2624171 (Nov. 19, 2004).

**Holding:** Former inmate failed to establish that detention center supervisor breached a duty of care owed to him. The corrections officer and the county were entitled to assert the defense of government immunity.

**Case Summary:** Joseph Kevin Livesay was arrested on June 30, 1999. Livesay was committed to a detention center. Livesay underwent two different health evaluations prior to being assigned to a cell. Both evaluations found that Livesay did not present a suicide risk.

**Under Maryland law,  
anyone who is a prison**

## **guard is a public official**

On July 5, 1999, an inmate alerted Corrections Officer Ricky Fore that there was an unconscious man in cell twenty. Fore ran up a flight of stairs to discover that Livesay was sitting slumped on the floor with a bed sheet tied between his neck and the bunk bed. Fore did not render direct assistance to Livesay. He radioed a medical alert to summon the facilities Emergency Response Team ("ERT").

The ERT arrived shortly after Fore radioed for help and rendered emergency medical aid until the paramedics arrived. Livesay suffered oxygen deprivation which caused some brain damage. He then filed suit against Baltimore County, the detention center warden, Classification Supervisor George Jackson, Fore, and a nurse that performed a health evaluation on him. Livesay alleged negligence against all the parties.

Livesay argued that the Local Government Torts Claim Act eliminated any immunity that the defendants might assert. He also contended that county officials, as opposed to municipal officials, are not entitled to statutory public official immunity. Finally, Livesay argued that Fore was not a public official, and that, even if Fore was a public official, he was not acting in a discretionary capacity.

The circuit court granted summary judgment in favor of Fore and Baltimore County on the grounds of public official immunity and governmental immunity and in favor of Jackson on the grounds that there were no material facts in dispute and he was entitled to judgment as a matter of law.

The Court of Appeals granted a writ of certiorari on its own initiative and affirmed the circuit court's decision.

The Court of Appeals cited prior Maryland case law in holding that the *per se* rule remains that anyone who is a prison guard is a public official. Thus Fore was a public official.

It also held that the plain language of the Operations Manual and the Lesson Plan, which both contain instructions for prison guards on how to respond to suicide attempts, makes clear that certain actions are *discretionary*, including direct lifesaving measures. Thus, Fore was acting in a discretionary capacity within the meaning of the public official immunity doctrine.

The Court of Appeals went on to state that the circuit court correctly concluded that no facts material to the claim against Jackson were in dispute and that Jackson was therefore entitled to judgment as a matter of law. Finally, because summary judgment was proper in regards to Fore and Jackson, it was also proper for the County.

## **MARYLAND COURT OF SPECIAL APPEALS**

### **Incomplete Record in Administrative Proceeding -**

*Cecil County Dep't of Social Services v. Russell*, 2004 WL 2534303 (Nov. 10, 2004).

**Holding:** In an action to enter an accused child molester's name in the child abuse registry, the audiotape of the accused's joint interview with the Department of Social Services and the local government investigators should have been included in the record provided to the accused and the Office of Administrative Hearings.

**Case Summary:** On March 13, 2000, the Cecil County Department of Social Services ("DSS") received information that a 16 year-old girl, "D," had been sexually abused by her friend's father on two separate occasions. The DSS and the Sheriff's Department assigned individuals to conduct a joint investigation of

the allegations. Two days later, the investigators interviewed D at her school, at which point she identified Danny Russell as her abuser.

The DSS and Sheriff's Department conducted a joint investigation of the allegations as required by the Maryland Family Law Code, § 5-706. The joint investigation against Russell included interviews of D, her mother, Russell, Russell's daughter, and two other witnesses. On August 3, 2000, as a result of the interviews, the DSS found Russell responsible for "indicated child abuse."

Russell appealed the finding to the Office of Administrative Hearings ("OAH"). At the hearing, the DSS introduced the contents of their record as well as the Sheriff's Department report. The Sheriff's Department report contained the statement that "[Russell] was advised that [the] interview would be audio taped," and that report became part of the record. However, the audiotape of Russell's interview was not part of the record.

The administrative law judge ruled that DSS could identify Russell as an individual responsible for indicated child sexual abuse in a central registry. Russell appealed.

The circuit court remanded the case to the OAH for the development of further evidence, specifically the audio tape of the Russell interview. It found that the local department's failure to enter the audiotape into the record prejudiced Russell's defense and deprived the administrative law judge of information that could have influenced her decision. Further, the circuit court held that if the Sheriff's Department failed to provide Russell with a copy of the audiotape, then the judge is to find that the omission gives rise to the presumption that if the audiotape was produced, it would be unfavorable to the Sheriff's Department. DSS appealed.

DSS argued that Russell had waived his right to challenge the exclusion of the audiotape from the record because he did not file a subpoena requesting its inclusion or production. The Court of Special Appeals did not find that argument persuasive. It concluded that the terms of the Maryland Family Law Code, § 5-701(t) required the inclusion of evidence such as the audiotape, regardless of whether a Defendant requests such information.

DSS also argued that because the audiotape remained in the custody of the Sheriff's Department, it was not part of the DSS records and therefore was not subject to mandatory disclosure as part of the record under § 5-701(t). The Court of Special Appeals refuted this argument as well.

**In a joint investigation,  
the records of both  
agencies are required to  
be part of the overall  
record of the  
investigation**

It found that because the DSS and the Sheriff's Department conducted a joint investigation (as mandated by law), the records of both agencies were required to be part of the overall record of the investigation. Furthermore, fairness required that Russell should have the opportunity to use the recording to test the statements and conclusions made by the investigators in their reports, and to test their credibility and recall, if necessary.

Therefore, the Court of Special Appeals affirmed the circuit court's decision that DSS and the Sheriff's Department were required to include the audiotape in the administrative record. However, it found that only an intentional or willful destruction of the audiotape could support a presumption unfavorable to the DSS. The mere inability to produce the audiotape would support an adverse inference rather than a

presumption.

### **Late Charges and Interest Rates -**

*Simpkins v. Ford Motor Credit Company*, 2004 WL 2756289 (Dec. 3, 2004).

**Holding:** In a class action suit brought against automobile lessor for the imposition of a late charge in excess of the six percent interest rate allowed by the Maryland Constitution, the Constitution did not apply as the late fee was charged under Commercial Law § 14-2002.

**Case Summary:** The facts of the case were undisputed. Wendy Simpkins entered into a lease agreement in 1996 and again in 1999 with the Ford Motor Credit Company. The lease agreement stated, "[y]ou will pay a late charge on each payment that is not received within 10 days after it is due. The charge is 7.5% or \$50.00, whichever is less." Simpkins paid the late fee at least twice during the two leases. Simpkins argued that this provision violated the Maryland Constitution, Article III, section 57, which states, "unless otherwise provided by the General Assembly" the legal rate of interest is six percent.

In their defense, Ford Motor Credit Company argued that section 14-2002(g) of the Commercial Law Article, allowed them to charge a late fee in excess of the six percent annum:

(1) If the lease permits, a lessor may impose on the lessee:

**Maryland Constitution  
provides that the legal  
rate of interest is six  
percent unless otherwise  
provided by the  
General Assembly**

- (i) A late or delinquency charge for payments or portions of payments that are in default under the lease;
- (ii) A collection charge, which may include all court and other collection costs actually incurred by the lessor, and, if the lease is referred for collection to an attorney who is not a salaried employee of the lessor, a reasonable attorney's fee;
- (iii) If any payment is made to the lessor with a check that is dishonored on the second presentment, a charge not to exceed \$15.

The primary question the court addressed was "whether the late charge identified in the leasing statute of section 14-2002(g) is lawful, so that Ford Motor was justified in imposing late fees that amounted to seven-and-a-half percent per annum of the delinquent payment." The primary goal of the court was to "ascertain and effectuate the intention of the legislature."

The court determined that "[i]f the General Assembly intended us to treat late charges of section 14-2002(g) as interest, subject to the constitutional limit, it would have referred to those charges as interest, not as 'late or delinquency charges.'" Furthermore, the court determined that "the statute specifically provides that the late fee amount is to be determined as 'the lease permits,' that is, between the contracting parties, rather than by the constitutional limit."

The court concluded that the seven and a half percent late fee did not constitute interest and stated that "[t]he Maryland Constitution provides that the legal rate of interest is six percent, 'unless otherwise provided by the General Assembly.'" With section 14-2002(g), the legislature did indeed provide otherwise.

## **Medical Malpractice -**

*Arrabal v. Crew-Taylor*, 2004 WL 2756282 (Dec. 3, 2004).

**Holding:** The court held that (1) the mother could not recover damages for lack of informed consent based on her physician's failure to advise her of the risks of prolonged pregnancy; (2) the fact that mother was not entitled to recover for lack of informed consent did not warrant the issuance of a new trial; (3) expert's testimony was sufficient to submit question to jury on whether fetus suffered conscious pain and suffering prior to birth; (4) the infant's estate had no right to recover past medical expenses; and (5) physician was not entitled to new trial on damages because there was not enough evidence to prove that jury verdict was excessive.

**Case Summary:** On October 17, 1998, Tracy Crew-Taylor, who had been pregnant with triplets for 30 weeks, entered Harbor Hospital Center in Baltimore. She sought treatment because she had noticed decreased fetal movement in one of the fetuses.

Initial testing results came back "non-reassuring." On October 18, an ultrasound indicated that one of the fetuses (later born as "Che") was not getting enough nutrients and oxygen. Dr. Arrabal, Mrs. Crew-Taylor's attending physician, attributed the non-reassuring test results to the mother's hyperglycemia. He did not consider the results adverse enough to require an immediate delivery of the fetuses, due to the significant risks attendant to pre-term delivery of multiple fetuses.

On October 19, results of another test indicated that Che had developed a severe reduced heart rate and "agonal heartbeat" which meant that he was almost terminal. Dr. Arrabal ordered an immediate Caesarian section. All three babies were delivered.

Che had no pulse when he was delivered and did not breathe for the first several minutes afterward. He was revived but was thereafter in a "vegetative state." He spent most of his short fourteen month life in various hospitals and died from his pre-birth injuries on December 6, 1999.

On April 4, 2001, Mr. and Mrs. Taylor filed a complaint against Dr. Arrabal and the hospital. The complaint alleged that Dr. Arrabal deviated from the applicable standard of care by failing to deliver the triplets immediately upon receipt of the test results that showed the fetuses were experiencing distress. The complaint also contained a lack of informed consent claim.

At trial, Mrs. Crew-Taylor testified that Dr. Arrabal had never informed her that any of the tests that had been administered were non-reassuring. Further, she stated that Dr. Arrabal never discussed with her the risks or benefits of continuing her pregnancy versus immediately delivering the triplets. One expert witness for the Crew-Taylors testified that Dr. Arrabal deviated from the standard of care in several respects. Another expert witness testified that in his opinion, Che suffered conscious pain and suffering prior to his death.

### **Continuation of a patient's pregnancy does not qualify as affirmative treatment**

The jury found in favor of the Crew-Taylors on all the counts in their complaint. The jury awarded Che's estate over \$635,000 in past medical expenses, \$6,651 (later reduced to \$3,500) in funeral expenses and \$200,000 in non-economic damages. The jury awarded Mrs. Crew-Taylor \$1.4 million in non-economic damages, which was reduced to \$778,837.50 and it awarded Mr. Taylor non-economic damages of \$150,000, which was reduced to \$83,662.50. Dr. Arrabal and the hospital appealed.

On appeal, Dr. Arrabal and the hospital argued that a lack of informed consent action must be predicated "on the failure [of the health care provider] to advise [the patient] of material risks," but that duty applied only when the provider plans to provide affirmative treatment affecting the physical integrity of the patient. Thus it was argued that the continuation of a patient's pregnancy does not qualify as an affirmative treatment.

The Court of Special Appeals agreed with the appellants on this argument. It found that under Maryland law, the harm alleged (Che's death) "did not arise out of any affirmative violations of [Mrs. Crew-Taylor's] physical integrity." However, even though the trial court erred in denying the appellants' motion for judgment as to the lack of informed consent count, he was not entitled to a new trial. The court held that because they were also found guilty of negligence (breaching the standard duty of care), the damages to the Che's estate and the Taylors would not have changed.

Second, the appellants argued that the jury should not have been allowed to consider whether Che's estate had incurred medical expenses. The Court of Special Appeals agreed. Under Maryland law, it is the parents who are generally responsible for the medical expenses of their minor child. Only under very narrow exceptions are minor children responsible for their own medical expenses. The court held that those exceptions did not apply to this case. Thus the judgment in favor of Che's estate for medical expenses was reversed.

Finally, appellants argued that the jury's verdict was excessive, improperly based on sympathy, and the product of confusion, erroneous jury instructions and a defective verdict form. The Court of Special Appeals held that the appellants did not present enough evidence to prove that the trial court abused its discretion in upholding the jury's verdict.

