

Recent Developments in the Law

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Workers Compensation Law: In *Beegle v. Restaurant Management, Inc. et al*, June 27, 1996, the District of Columbia Court of Appeals held that the trial court's grant of summary judgment was improper when there was a factual issue regarding the relationship between an independent contractor and an employee, and whether the relationship was legally sufficient to serve as the basis for a negligence claim against the independent contractor. The case involved an employee of a restaurant who sustained severe burns when a co-worker lit a chafing dish which exploded. The injured employee filed a complaint which alleged, among other things, negligence against an independent contractor who was hired by the owner of the restaurant to run the restaurant. The independent contractor contended that the employee was barred from bringing an action against him because the employee had already recovered worker's compensation from the restaurant owner. The employee responded that the independent contractor was not an agent of the restaurant owner within the meaning of the workers' compensation statute, but an independent contractor with complete management responsibility for the restaurant at the time she was injured. The D.C. Court of Appeals determined that because there was an issue of fact regarding the relationship between the two parties, the summary judgment was improper.

The issue of fact in question was whether the independent contractor had exercised or had the right to exercise control over the alleged negligent acts of the employee so as to hold him liable under the theory of *respondeat superior*. While D.C. case law has held independent contractors liable for the actions of their employees in the past, those cases differ from this case because the workers allegedly responsible for the injuries in those cases were undisputedly employees of the independent contractors. Here, there was no question that the allegedly negligent co-worker was an employee of the restaurant's owner, rather than of the independent contractor. Nonetheless, the Court reasoned that one company may be vicariously liable for the negligent acts of an employee employed by another if it is determined that the employer has the right to control and direct the servant in the performance of his work and the manner in which the work is to be done. In analyzing the level of control, the Court remarked that both the contractual and actual relationship should be reviewed. Consequently, the factual issue regarding whether the independent contractor hired to run the restaurant, actually controlled the restaurant owner's employee who allegedly committed the negligent act to the requisite extent to invoke liability, remained in dispute, and the judgment of the trial court was reversed and remanded.

Insurance Law: In *Martin Marietta Corp. et al v. State Farm Mutual Automobile Insurance Co.*, July 24, 1996, the Maryland Court of Appeals changed its mind about reviewing a lower court's decision that a business's insurer is liable for a company car accident, even though the driver wasn't an employee. In the case, a Martin Marietta Corp. employee gave an individual permission to use his company car and the individual crashed the car into another car, injuring its driver. The trial court judge determined that there was insufficient evidence that the driver had permission to use the car and therefore refused to hold Martin Marietta responsible. The Court of Special Appeals determined that, based on the conflicting testimony regarding whether the driver had permission to use the car, the decision should have been left to the jury. Martin Marietta petitioned to the Maryland Court of Appeals for review. Review was granted, and oral arguments were heard in May. However, the Court of Appeals ultimately decided to not review the decision, and consequently the Court of Special Appeals' decision to remand the case will stand.

The Court of Special Appeals reasoned that a vehicle owner's liability insurance covers other drivers if they use the vehicle as the owner's agent or with the owner's consent. The law presumes that the driver of a vehicle is the agent of the owner and that the owner has permitted the driver to use the car. The burden is on the owner to show there was no agency relationship between the owner and driver and that the owner did not consent to the driver's use.

Insurance Law: In *Robert T. Sheets Jr. et ux v. The Brethren Mutual Insurance Co.*, July 26, 1996, a split Maryland Court of Appeals held that an insurance company was in error when it refused to defend its policyholders against a negligent misrepresentation claim. The insurance company claim that, based on the language in the general liability policy, they were not required to do so. However, the Court reasoned that the damage caused by a negligent misrepresentation is unforeseen and unexpected, and therefore can be classified as an "accident" which is covered by the liability policy. Based on this analysis, the Court ordered the insurer to defend the policyholders against the negligent misrepresentation claim filed against them.

In the case, the policyholders sold their farm, which was insured under a general liability policy. A short period of time after moving in, the buyers had to replace the septic system at a cost of more than \$12,000. Alleging intentional and negligent misrepresentation that the septic system was in good working condition, the buyers instituted a suit against the policyholders. Claiming they were not required to provide a defense based on the language in the policy, the insurer refused to defend the policyholders in the suit. On review, the Court of Appeals determined that the insurance company was wrong in not defending the policyholders. Based on the terms of the insurance policy, property damage claims are covered if they fall within the policy period and are caused by an "occurrence", which is defined as an accident under the policy. The Court determined that a negligent act that causes an unexpected and unforeseen damage qualifies as an accident, and that the alleged negligent misrepresentation was an occurrence or accident for purposes of the policy.

Labor Relations: In *Robert Waskiewica v. General Motors Corp.*, July 29, 1996, the Maryland Court of Appeals held that an assembly-line worker who failed to reopen his claim for workers' compensation benefits under The Maryland Workers' Compensations Act, after initially applying for such benefits in 1976, was barred by the five year statute of limitations from reopening the case. The worker's disability due to carpal tunnel syndrome increased from a 15% loss of use of both hands to a 100% loss of use, and the worker underwent surgeries in 1976, 1983, 1986, 1987, 1988 and 1989. However, the Court determined that based on the plain meaning of the statute and the case law, the worker should have reopened and asked for a modification of his 1976 carpal tunnel claim at least once every five years as his initial condition worsened.

Tort Law: In *Jane Doe et al. v. A. Joseph Maskell et al.*, July 29, 1996, the Maryland Court of Appeals rejected the scientific validity of repressed memory syndrome and dismissed a lawsuit filed by two women who alleged they were sexually abused by a priest more than 20 years ago, but failed to remember it until recently because they had repressed the memories. The women alleged that because the priest abused them so severely, and threatened to harm them if they revealed the abuse, they had repressed the memories until 1992. The Court determined that the applicable three year

statute of limitations period begins to run when the plaintiff knows or reasonably should have known that an actionable harm was done to them. Therefore, in this case, the period began to run when the abuse stopped. The Court specifically wrote that "we are unconvinced that repression exists as a phenomenon separate and apart from the normal process of forgetting." The Court reasoned further that "it follows that they should be treated the same legally."

Disability Law: In *Eduardo Burkhart v. Washington Metropolitan Transit Authority and Archie James Smith*, a jury awarded a \$100,000 verdict against the Washington Metropolitan Area Transit Authority (WMATA) based upon a bus driver's violation of the Americans with Disabilities Act. Eduardo Burkhart, a deaf bus rider, was assaulted by a bus driver who refused to communicate with Burkhart to tell him he had paid the wrong fare after Burkhart communicated to him he was deaf and needed him to write down his statement. The bus driver slapped Burkhart and pushed him and his friend off of the bus. When WMATA officers refused to press charges or provide a sign-language interpreter, Burkhart filed suit. The WMATA has refused to acknowledge any wrongdoing and still claims that it has no duty to provide sign-language interpreters to deaf commuters when the need arises.

Medical Product Liability: In *Medtronic, Inc. v. Lohr*, June 26, 1996, the United States Supreme Court held that makers of medical devices can be sued in state courts for the alleged defects in their products regardless of whether they complied with federal laws and regulations. In the case reviewed by the Supreme Court, the Lohrs filed a state-court claim alleging negligence and strict liability against the manufacturer of pacemaker. The case was removed to federal district court, where the court dismissed the action based on the court's finding that the action was preempted by federal law. On review, the Supreme Court overruled the lower court's dismissal. The Court stated that the language in 21 U.S.C. 360k(a), which regulates the safety and effectiveness of medical devices intended for human use, did not pre-empt state rules that merely duplicate the FDA's rules regulating manufacturing practices and labeling. Consequently the Lohrs' negligent claims were not preempted.

Insurance Law: In *CSX Transportation, Inc. et al. v. Continental Insurance co. et al.*, August 7, 1996, the Maryland Court of Appeals held that an insurer was under no obligation to indemnify CSXT Transportation, Inc. for the claims arising from railroad employees' noise induced hearing loss. The basis for the Court's decision rested upon the determination of whether the employees' lawsuits arose from one occurrence - the railroad companies' failure to institute hearing-protection policies for employees or whether each suit arose from separate occurrences. Taking the case on direct appeal, the Court of Appeals determined that the definition of occurrence was an issue for the jury to decide. Therefore, the Court further reasoned, giving an instruction to the jury that the injured workers' claims arising from a common cause form one occurrence, would be equivalent to directing a verdict in favor of the insured.

Civil Procedure: In *Karen M. Lawhorne et vir. v. Employers Insurance Company of Wausau*, Aug. 2, 1996 the Maryland Court of Appeals held that a tort claimant is not entitled to collect interest on interpleader funds until the court instructs the insurance company to hand the money over for safekeeping. In the case, an automobile liability insurer was faced with multiple claims against the insured that far exceeded the coverage under the policy. The insurer paid into the registry of the court the sum of \$1,000,000.00 less costs. Based principally on the fact that Maryland law does not recognize prejudgment interest for personal injury claims, the Maryland Court of Appeals affirmed

the Court of Special Appeals' decision to not grant the petitioners request for interest on the funds.

Civil Procedure: In *North River Insurance Company and the United States Fire Insurance Company, et al. v. Mayor and City Council of Baltimore*, Aug. 1, 1996, the Maryland Court of Appeals, on its own motion, issued a writ of certiorari prior to consideration of the matter by the Court of Special Appeals, held that the lower court abused its discretion when it ordered a default judgment on two liability insurers who allegedly failed to cooperate with discovery requests. The circuit court ordered the production of documents relating to the insurers other customers, prior to ruling on a pending confidentiality issue. The insurers argued that the discovery request for the production of insurance policies of companies not involved in the case would infringe on those companies' confidentiality. While in the process of compiling the documents, the insurers sent letters to their customers who would be affected by the discovery request, and told them they should move for protective orders to protect their confidentiality. Notwithstanding the fact that the court received a substantial number of inquiries from customers of the insurers, and numerous companies actually filed protective orders, the circuit court did not address the confidentiality issue.

The Court of Appeals stated that this failure to rule on the confidentiality issue prior to ordering the assembly and production of discovery documents was an abuse of discretion. In addition, the court's subsequent imposition of sanctions was also an abuse and in error. Subsequent to this ruling, the case was remanded to the Baltimore City Circuit Court for further proceedings.

Insurance Law: In *Smalls v. State Farm Mutual Automobile Insurance Company*, June 26, 1996, the District of Columbia Court of Appeals affirmed the lower court's ruling that a "household exclusion" clause contained in a automobile insurance policy is valid as long as it does not fall below the minimum amounts of third party personal liability coverage automobile owners are required to carry based on D.C. statutory law. The Court rejected the argument that the "household exclusion" clause was invalid because it was contrary to public policy as embodied in the statutory language of the No-Fault Act, which is "to provide adequate protection for victims who are injured in the District or who are injured while riding in motor vehicles registered or operated in the District." D.C. Code §35-2101(b). The Court concluded that the "household exclusion" clause is invalid only to the extent that it conflicts with the No-Fault Act.

In the same case, the Court also affirmed the lower court's ruling that the doctrine of reasonable expectations did not apply to the "household exclusion" clause. The Court reasoned that the doctrine is generally used to interpret ambiguous provisions in a manner that is consistent with the reasonable expectations of the purchaser of the policy, but that because the language in the policy regarding the "household exclusion" was clear and unambiguous, there was no legal basis upon which to use the doctrine.

Civil Procedure: In *United States v. Esparza*, *U.S. v. Sanders*, *U.S. v. Penney*, *U.S. v. Soedomo*, and *U.S. v. Duncan*, Feb. 2, 1996, the United States Supreme Court held that the seizure of vehicles each time a defendant was arrested for sexual solicitation pursuant to District of Columbia Code §22-2723. That section of the D.C. Code authorizes the seizure and forfeiture of vehicles used to facilitate violations of D.C. Code §22-2723 which relates to sexual solicitations. There were five different

cases which the Court reviewed. The defendants in *U.S. v. Esparza*, *U.S. v. Sanders*, and *U.S. v. Penney* attacked the District of Columbia's authority to seize and hold vehicles for forfeiture, the defendants in *U.S. v. Duncan* and *U.S. v. Soedomo* argued that the forfeiture violated the Excessive Fines Clause of the Eighth Amendment, and the defendant in *U.S. v. Duncan* claimed a violation of the Double Jeopardy Clause of the Fifth Amendment.

The Court held that based on the broad language of the applicable statute and its legislative history, there was probable cause to believe that the seized vehicles were used to facilitate a the violation of the D.C. law regarding sexual solicitations. The Court also found, however, that the *in rem* forfeitures constitute monetary punishment and are therefore subject to the Excessive Fines Clause of the Eighth Amendment. In determining whether the forfeitures were excessive based on the facts of the case, the Court developed a two step test. First the Court employed a five part instrumentality test to determine the how substantial or significant the relationship between the seized motor vehicles and the actual offense of sexual solicitation is. The more substantial the relationship, the more likely the Court will be to render the property "guilty", and therefore forfeitable. Second, the Court used the proportionality analysis and balanced the estimated value of the vehicles with the gravity of the offense or conduct. The Court determined that the based on the circumstances of these cases, the forfeitures failed both tests, and therefore constituted a violation of the Excessive Fines Clause.

Finally, the Court also found that the District of Columbia's seizure of the vehicles was the equivalent of punishing the defendants a second time for the same offense which is obviously prohibited by the Double Jeopardy Clause of the Fifth Amendment.

Insurance Law: In *Kathryn C. Toscano v. Hope Spriggs*, August 21, 1996, the Maryland Court of Appeals held that a person injured by someone who is driving a car for his own benefit, but does not own the car, cannot sue the owner of the car based on the theory of agency. Even though there is a presumption of an agency relationship between the owner of the car and the non-owner driver, the Court determined that because the person who was driving the car was driving for his own benefit, rather than for the benefit of the owner, the agency theory could not be used by the injured plaintiff. The Court found that, based on the evidence, the owner of the car had overcome the agency presumption.

The Court also recognized that there is a presumption that a non-owner operator of a vehicle operates it with the permission of the owner, and that contradictory evidence regarding who was allowed to use the car supported the permissive use presumption. The Court determined, however, that the contradictory evidence regarding permissive use did not support an inference of agency in the case.

Insurance Law: In *Calvin E. Reames, et al v. State Farm Fire and Casualty Insurance*, October 1, 1996, the Court of Special Appeals of Maryland held that the insurer's duty to defend a claim that is potentially covered by a policy is determined by evaluating the causes of action that were actually alleged in the Complaint and not those that might have been brought in the Complaint, as well as the relevant extrinsic evidence.

In the underlying tort claim the plaintiff alleged causes of action of 1) malicious prosecution and 2) abuse of process. The Complaint alleged facts which included assault and battery but no count or cause of action seeking a recovery for assault and battery was set forth within the Complaint.

The importance of this decision is that the Court, in determining the insurer's duty to defend, focused on the allegations expressly set forth in the Complaint. The Court's rationale, simply stated, was that an insurer has the duty to defend its insured if there is a potentiality that the claim may be covered in the policy and that obligation is determined by the allegations in the underlying tort action. If the plaintiff in the tort suit alleges a claim covered by the policy,

the insurer has a duty to defend where the potentiality exists that the claim could be covered by the policy. The Court indicated that the duty to defend arises only when "those allegations state a legal claim - since otherwise there is nothing to defend - that is within the coverage of the policy".

The Court further indicated that the issue of whether the allegations in the tort action potentially bring the tort claim within the policy coverage is governed solely by evaluating the causes of action actually alleged by the plaintiff in that lawsuit along with the relevant extrinsic evidence.

"This extrinsic evidence must, however, relate in some manner to a cause of action actually alleged in the Complaint and cannot be used by the insured to create a new, unasserted claim that would create a duty to defend. Unasserted causes of action that could have potentially been supported by the factual allegations or the extrinsic evidence cannot form the basis of a duty to defend because they do not demonstrate a reasonable potential that the issue triggering coverage will be generated at trial."

