

Recent Developments in the Law

Vol. No.XIII

July 28, 1997

Workers' Compensation Law:

In *Clifford Buckler v. Willett Construction Co.*, April 14, 1997, the Maryland Court of Appeals ruled that a construction worker who was injured on the job, but moonlighting as a security guard, could not receive full workers' compensation benefits. The claimant had injured his hand when he fell on the construction site, and while he stopped working at the construction job, he continued to work as a security guard at night. The Court reasoned that, "If the injury allows a claimant to perform duties of some other occupation, the claimant is not totally disabled within the meaning of the Act." Total disability is synonymous with the inability to work which the Court pointed out was obviously not the situation in this circumstance.

Tort Law/Punitive Damages:

In *Robert Scott v. Terry Napoleon Jenkins*, March 14, 1997, the Maryland Court of Appeals held that plaintiff seeking punitive damages must specifically plead for them. The plaintiff filed a complaint against Robert Scott, a Prince George's County police officer for battery and false arrest, asking for \$500,000, plus costs and interest and "for such other and further relief as the court may deem just and proper." No specific request for punitive damages or allegations of malice were made. The jury returned a verdict of \$150 compensatory damages, and \$1,000 punitive damages. The Court of Appeals reversed the lower and appellate courts' decisions, reasoning that in order to properly plead a claim for punitive damages, a plaintiff must make a specific demand for that relief in addition to a claim for damages generally, as well as allege, in detail, facts that, if proven true, would support the conclusion that the act complained of was done with "actual malice."

Asbestos:

In *The Anchor Packing Co. et al v. John Grimshaw et al.*, April 3, 1997, the Maryland Court of Special Appeals held that those asbestos-related claims that arose after the enactment of Maryland's statutory cap on non-economic damages, was subject to the law. The appellate court stated that a wrongful death action arises from the date of the death of the injured party. Both of the plaintiffs died after the effective date of the statutory cap of \$500,000 for non-economic damages in wrongful death cases was enacted. However, with respect to the personal injury claims, application of the statutory cap is triggered when the cause of action arises. In injury occurs in asbestos-related injury case when the inhalation of asbestos fibers causes a legally compensable harm, which is when the plaintiff's bodies developed cancer. Symptoms of these ailments were not sufficient, and therefore the statutory cap in effect at the time the claimants' bodies developed cancer was the proper cap to apply.

Tort Law:

In *Donna K. Bresnahan v. William B. Bresnahan*, April 2, 1997, the Maryland Court of Special Appeals held that in a fiduciary duty case, the plaintiff must show proof of actual malice by clear

and convincing evidence before a grant of punitive damages is proper. In this Court's decision in Hartlove v. Maryland School for the Blind, 111 Md. App. 310 (1996), vacated and remanded for reconsideration, ___ Md. ___ (1997), the independent tort of breach of fiduciary duty was established. While the 2nd Restatement of Torts recognizes that the breach of a fiduciary relationship alone is sufficient to allow a grant of punitive damages, the Court refused to extend Maryland law to this level and maintained the well recognize standard for punitive damages in non-intentional torts cases. The plaintiff must show that the defendant's conduct was characterized actual malice.

Civil Procedure Law:

In Kevin J. Scott v. Ford Motor Credit Company, April 8, 1997, the Maryland Court of Appeals held that a four year statute of limitation applies to deficiency judgment actions. Analogizing deficiency judgment actions to a suit to recover the balance of the purchase price of goods in an action for a breach of contract for a sale, the Court applied the four year time limit under Article 2 of the Uniform Commercial Code, rather than the general three year limit that the debtor, Kevin J. Scott, argued should be applied.

Fair Housing Act:

In Jonathan E. Pumphrey, Clay Keith, Baltimore Neighborhoods Inc. v. Stephen Homes Inc. and Sheila Ort, March 25, 1997, the U.S. Court of Appeals for the Fourth Circuit ruled that the federal standard for allowing punitive damages, rather than Maryland law, applied in a discriminatory housing practices case. Under the federal law, when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifferences to the federally protected right, punitive damages are recoverable. Sheila Ort, a Hartford County real estate agent was accused by Jonathan Pumphrey, an African American, of violating the Fair Housing Act, when she told Mr. Pumphrey that a lot wasn't for sale, when in fact it was.

Medical Malpractice:

In Robinson, et al. v. Group Health Association, Inc., March 27, 1997, the D.C. Court of Appeals ruled that the trial court erred in directing the verdict in a medical malpractice case. The plaintiffs, James and Eunice Robinson alleged that the defendant, Group Health Association (GHA) was negligent in their care of an ulcer on Mr. Robinson's foot which resulted in the amputation of his leg below his knee. The trial court, at the close of the plaintiffs' case, granted a directed verdict in favor of the defendants on the basis of the plaintiffs failure to establish causation. Finding that the testimony of the plaintiffs' expert that to a reasonable degree of medical certainty (greater than 50%) other treatment would have avoided the amputation, was sufficient to establish a question as to causation. Therefore, the Court of Appeals reasoned, the case should have gone to the jury.

Federal Tort Claims: In Simpkins v. District of Columbia Government, et al., the U.S. Court of Appeals for the D.C. Circuit held that where a plaintiff had failed to file an administrative

complaint, as required by the Federal Tort Claims Act, the District Court lacks subject matter jurisdiction. D.C. General Hospital reported to a federally-run data bank that the Plaintiff, Dr. Simpkins has resigned his staff privileges at the hospital after a review of his quality of care. Dr. Simpkins brought a damage action the Data-Bank, D.C. General Hospital, the Secretary of the Department of Health and Human Services - Dr. Sullivan, and several other individuals. The U.S. District Court dismissed all of the claims against the United States and Dr. Sullivan, with prejudice, on a summary judgment motion, and all of the claims against the Data Bank without prejudice for failure to prosecute. The plaintiff argued that the claim against Dr. Sullivan should not have been dismissed with prejudice. Rather, once the court found that Dr. Sullivan had been improperly served, the case should have been dismissed without prejudice and the court should have been precluded from rendering a further decision based on the merits of the case. However, the Court of Appeals found that this would have simply allowed the plaintiff to turn around and file the same worthless cause of action against Dr. Sullivan again, and would be inconsistent with the duty of the lower court to stop insubstantial actions against officers, and get rid of them.

Reviewing the counts in the plaintiff's complaint which fell under the Federal Torts Claim Act (FTCA), the Court of Appeals found, however, that it was an error for the lower court to have dismissed these counts on the merits. Once the district court determined that the plaintiff had not complied with the requirements of the FTCA and filed an administrative claim with the Department of Health and Human Services, the district court lacked subject matter jurisdiction and had no authority to rule either way on the merits.

Insurance Law:

In *Bernard J. Staab et ux. v. American Motorists Insurance Company*, May 5, 1997, the Maryland Court of Appeals held that a couple with a \$300,000 limit in the automobile coverage of their comprehensive liability policy, was entitled to uninsured motorist benefits in excess of that limit. The Staabs were involved in an accident in which the other driver, who was at fault, had only the statutorily required minimum of liability coverage - \$20,000 per person and \$40,000 per occurrence. To cover their costs in excess of the \$40,000, the Staabs made an insured motorist coverage claim under their policy. Their policy contained \$300,000 worth of uninsured motorist coverage and \$3 million in excess liability coverage. In allowing the Staab's to recover the excess, the high court reasoned that Article 48 S541(g) provides that, unless waived by the first named insured, the amount of insured motorist coverage under a policy of private passenger vehicle insurance shall be equal to the amount of liability coverage provided under the policy. The court found that the excess liability coverage (the endorsement) constituted liability coverage under the policy, and therefore, absent a written waiver by the Staabs, their insurance carrier had to provide equivalent uninsured motorist coverage.

Negligence:

In *Gwendolyn Tennant v. Shoppers Food Warehouse*, May 6, 1997, the Maryland Court of Special Appeals held that the trial court erred when it granted summary judgment in favor of the grocery store. The plaintiff, Gwendolyn Tennant, was grocery shopping when she slipped on a pile of cabbage leaves and injured herself. The lower court found that as a business invitee, the grocery store was required to warn the shopper of known, hidden dangers and to inspect the premises to discover possible dangers and take reasonable precautions to guard against such dangers. The court further noted that the shopper has a duty to exercise due care for her own safety, and the grocery store will not be liable to guard against open, obvious and present dangers. The Court of Special Appeals found that in this case it was up to the jury, not the judge, to decide whether the

grocery store had created a dangerous condition, about which it knew or should have known, and whether the shopper failed to take adequate and reasonable care for her own safety.

Employment Law:

In *Mohammed S. Quraishi v. Donna E. Shalala et al.*, April 29, 1997, the U.S. District Court for the District of Maryland held that a plaintiff must exhaust administrative remedies before raising a national origin discrimination suit in federal court. Failure to exhaust administrative remedies must result in dismissal. A microbiologist at the National Institute of Health claimed that he was passed over for a promotion because of his national origin, and instead of raising a claim at the administrative level before the Equal Employment Opportunity Commission, he filed suit in the U.S. District Court.

Contract Law:

In *JMP Associates Inc. v. The St. Paul Fire & Marine Insurance Company*, May 12, 1997, the Maryland Court of Appeals found that the word "on" in an insurance policy is ambiguous, and therefore the case must go to trial. The insurance policy was a jeweler's block policy that had been issued by The St. Paul Fire & Marine Insurance Company to cover the losses incurred by a JMP employee. The incident involved the loss of \$150,000 worth of jewelry when a JMP salesman, on his way to North Carolina on a business call, had the jewelry on the trunk of his car when he started on the trip and found they were not there when he arrived. The employee had stopped for gas, and while paying for the gas he lost sight of the car when a van pulled up in front of him while he was paying. Pursuant to the policy there was coverage for losses occurring from a vehicle where the employee is in or on the vehicle at the time of the loss. While the lower and appellate court agreed that St. Paul was correct in denying coverage, Maryland's high court disagreed and found the language ambiguous.

Contract Law:

In *Michael G. Gilman v. Wheat, First Securities Inc.*, April 15, 1997, the Maryland Court of Appeals ruled that Virginia's law on class actions is not a sufficient deficiency to override the designated forum clause contained in a contract. The plaintiff has alleged that a brokerage firm was realizing "secret profits." The contract between the plaintiff and the brokerage firm stated that the dispute was to be resolved through arbitration and that Virginia would be the judicial forum. Because each account-holder's damages are minuscule, the plaintiff attempted to form a class action suit, but, Virginia dicta indicated that such suits were not allowed in the state. Reviewing the law of forum selection clauses, the Maryland high court stated that short of fraudulent conduct or overreaching by the party preparing a contract - or where enforcement would compromise a strong public policy of the state where suit is sought - forum selection clauses are presumed valid.

Insurance Law:

In *David Litz v. State Farm Fire and Casualty Co. et al.*, June 27, 1997, the Maryland Court of Appeals held that since an insurer's duty to defend is broader than its duty to indemnify, and a severability provision in the policy raises the potentiality for coverage, the insurer is obligated to defend the non-business participant homeowner. The plaintiff, David Litz, is the husband of a woman who was sued in an action arising from her home-based babysitting company. The insurer, State Farm Fire and Casualty Co., believed the homeowners policy excluded liability for damages

resulting from a business pursuit, and therefore the accident at the heart of the suit fell outside David Litz's coverage. The trial court, and a split Court of Special Appeals sided with State Farm, but the Court of Appeals, in agreement with the dissenting opinion in the lower appellate court, found that the "Severability of Insurance" provision in the policy raised the potential that David Litz's claim was covered. Judge Raker concluded, "the mere possibility that the insurer will have to indemnify triggers the duty to defend."

Public Utilities:

In *Board of County Commissioners of Garrett County v. Bell-Atlantic Maryland Inc.*, June 19, 1997, the Maryland Court of Appeals found that the statute codified as Art. 78 S 28A, the "Miss Utility" statute, which requires contractors to call a special number before excavating, was enacted to protect the property of public service companies, but should be applied under ordinary negligence theory and not strict liability. The Garrett County Roads Department, on two separate occasions, damaged underground cables belonging to Bell-Atlantic Maryland, Inc. during excavation work. As a result, Bell filed two separate complaints against the Garrett County Roads Department for negligence. The County asserted that Bell was not an "owner" within the contemplation of Miss Utility because it did not possess the "right" to bury its cables at either or the roadside locations. Bell asserted that the Legislature granted it, under Art. 23, SS318 and 340, a state-wide franchise to bury its cables along any and all streets, highways, and postal routes. The Court found the history of SS318 and 340 revealed that the General Assembly intended the telephone and telegraph corporations make full use of the state's public roadways to accomplish their objectives for the benefit of those corporations and the public alike.

Workers' Compensation:

In *Patricia Getson v. WM Bancorp*, June 12, 1997, the Maryland Court of Appeals ruled that a permanent partial disability from a shoulder injury is properly classified as an "other cases" injury for the purpose of workers' compensation. Patricia Getson suffered a compensable injury to her right shoulder when she slipped and fell on ice in her employer's parking lot. The Workers' Compensation Commission found that Getson had suffered a permanent partial disability resulting in a 30 percent loss of industrial use of her body. Section 9-627 governs the classification of injuries for the purposes of permanent partial disability compensation. The Maryland Court of Appeals, in concurrence with the Court of Special Appeals, found that such an injury is properly classified as an "other cases" impairment because it is not listed among the scheduled body parts specifically enumerated under Maryland law.

Damages:

In *Moattar v. Foxhall Surgical Assoc., Richard P. Derosa, Appellees*, April 30, 1997, the D.C. Court of Appeals ruled that the trial court erred in removing from jury consideration the plaintiff's claim for loss of future earnings because of the probability of her premature death due to the defendant's medical malpractice. The case arises out of a claim for medical malpractice in which the appellant, Vida Moattar, alleged that the eight month delay by appellee, Dr. Richard DeRosa, in diagnosing and treating her breast cancer caused her permanent injuries and damages and would probably result in her premature death. The trial court refused to hear Ms. Moattar's expert witness who was to testify regarding the value of her future loss of earnings. The court concluded that the issue was not ripe for consideration until her cancer actually recurred, or until her death. The D.C. Court of Appeals reversed this decision. Pursuant to D.C. App.R. 5, the Court of Appeals granted Ms. Moattar's application to determine whether a jury should consider claims for future loss or

earnings in a personal injury action where, due to the defendant's negligence, her life expectancy will be reduced.

Negligence:

In *Fuller, et ux. v. Chemical Specialties Manufacturing Corp., et al.*, May 8, 1997, the D.C. Court of Appeals reversed the trial court's granting of a summary judgement in favor of the appellees, Charles G. Stott and Company, Chemical Specialties Manufacturing Corporation, and E.I. du Pont de Nemours and Company. Michael Fuller brought a product liability action alleging that he was injured when he opened a pressurized spray tank used to apply carpet treatment products and inhaled a "misty blast" containing a substance called Stainshield. As a result, Fuller claims he developed reactive airways disease (RAD). He also alleged that the Stainshield product label was inadequate in that it failed to warn users that the product was a respiratory irritant, that he relied upon and followed the label instructions regarding safe use of the product, and that his injury was foreseeable by the defendants and could have been prevented by a label warning users of the product to wear a filter mask. The trial court granted summary judgement ruling that Fuller produced no evidence as to the deficiency of the warning provided, or the basis for that warning with regards to the chemical or other properties of Stainshield. The trial court also ruled that Fuller had not provided proximate cause evidence. Therefore, the trial court concluded that Fuller had not established an issue of fact as to whether his injury was causally related to the specific ingredients in Stainshield.

The Court of Appeals ruled otherwise and found that Fuller did present evidence from which a reasonable jury could find the product hazardous and, if inhaled, could cause the type of injury suffered by Fuller. The Court of Appeals concluded that the evidence presented would sustain a finding that ChemSpec knew of the product's potential danger and how to guard against it, that ChemSpec had a duty to warn of these hazards, and that the warning label on Stainshield did not do so. The Court of Appeals believed Fuller produced evidence that inhalation of Stainshield caused his injuries and he could have protected himself from this danger if he wore a filter mask. Because these facts are sufficient to support Fuller's claim, the Court of Appeals found that the trial court erred in granting ChemSpec and Stott a motion for summary judgement.

Landlord-Tenant Law:

In *Amberwood Associates Limited Partnership Inc., et al. v. Shanita Matthews*, May 28, 1997, the Maryland Court of Specials Appeals, reversing a 1994 Baltimore City Circuit Court ruling, found that no-pet clauses in landlord-tenant contracts are meant to protect the premises, not tenants or invitees and therefore, the clauses create no duty on the part of landlords to protect social invitees. The suit arises out of an incident where a pit bull mauled and killed a sixteen month old infant. The mother, Shanita Matthew, brought the baby to the apartment of Shelly Morton, the keeper of the pit bull. After the dog attack, Ms. Matthew brought suit against the apartment landlord and property manager. She was awarded \$5.9 million dollars by the Baltimore City Circuit Court. The Maryland Court of Special Appeals reversed the decision and ruled that the no-pets clause did not create a legal duty on the landlord's part to protect a social guest who was in violation of the lease.

Negligence:

In *Poyner v. Loftus, et al.*, May 8, 1997, the D.C. Court of Appeals affirmed the ruling of the trial court in granting the defendants a motion for summary judgement. A personal injury suit was filed

by William Poyner, who is legally blind, after he fell from an elevated walkway and suffered injuries. The trial judge granted summary judgement to the defendants concluding that Mr. Poyner was contributorily negligent in the accident. In agreement with the trial court, the Court of Appeals concluded that Mr. Poyner's own testimony established that his own contributory negligence proximately caused the accident. Mr. Poyner testified that while walking on an elevated sidewalk his attention was distracted when someone called his name. As he turned his head to look, Mr. Poyner continued walking and fell off the elevated walk. The Court of Appeals concluded that his contributory negligence stemmed from the fact that, although legally blind, he was not using the assistance of a seeing eye-dog or a walking staff, and he was not looking where he was walking.

