

Recent Developments in the Law

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In order to keep you abreast of the recent developments in the law, we are reporting the substance of several current decisions of major import in the jurisdictions of Maryland, the District of Columbia, and Virginia.

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MARYLAND COURT

OF APPEALS

Insurance-Reduction in uninsured benefits -- *Lewis v. Allstate Insurance Co.*, 368 Md. 44, 792 A.2d 272 (2002). The Court of Appeals held that even though an insured motorist had previously been paid \$5,000 under the medical payments endorsement in his own insurance policy, he was still entitled to the full \$11,154 jury award for uninsured motorist benefits. The Court held that there is no statutory authorization for a policy provision which reduces the amount of an uninsured motorist benefits, to which the insured is otherwise entitled, by the amount of money which the insurer had previously paid to the insured under a medical payments endorsement in policy.

Products Liability - Defects in Handguns -- *Halliday v. Strum, Ruger & Co., Inc.*, 368 Md. 186, 792 A.2d 1145 (2002). Mother of a three-year old who shot himself to death with his father's gun failed to state a cause of action for strict liability against the gun manufacturer of the gun, since, under the consumer expectation test, the handgun functioned as intended and as expected and, therefore, was not defective. What caused the tragedy was the carelessness of the father in leaving the loaded weapon where the child was able to find it.

Statute of Repose-Breach of Contract and Warranty -- *Hagerstown Elderly Associates v. Hagerstown Elderly Building Associates, et al.; Houck and Co. v. Dryvit Systems*, 368 Md. 351, 793 A.2d 579 (2002). The statute of repose, a law that protects members of the construction industry from lawsuits filed to recover for damages caused by long-latent defective conditions, applies to all causes of action and pleadings, including breach of contract and breach of warranty.

Insurance-Personal Injury -- *MeGonnell v. U.S. Automobile Association*, 368 Md. 633, 796 A.2d 758 (2002). The Court of Appeals reversed the Court of Special Appeals, finding that an exclusion limiting liability in a primary automobile policy applied only to that policy and not to the excess coverage section of a second umbrella policy. Once the policy limits pursuant to a household exclusion of the primary automobile policy were satisfied, the exclusion did not apply to claims brought under the excess coverage section of the umbrella policy. The insurer's contention that the exclusions applicable to the primary policy also apply to the victim's claim was unfounded, and would ultimately defeat the purpose of purchasing an umbrella policy.

Personal Injury, Asbestos-Statutory Interpretation -- *Crane v. Scribner*, 2002 WL 1277581 (Md. June 11, 2002). In actions for personal injury founded on exposure to asbestos, for purposes of deciding whether to apply the statutory cap for non-economic damages for exposure occurring after July 1, 1986, the Court of Special Appeals adopted the exposure approach. This method allows plaintiffs whose exposure occurred prior to July 1, 1986 to avoid the statutory cap, even though the disease had not manifested itself after that day.

Personal Injury, Asbestos-Evidence -- *Georgia Pacific Corporation v. Pransky*, 2002 WL 1277576 (Md. June 11, 2002). The Court of Appeals reaffirmed \$9 million award for asbestos related mesothelioma since the evidence presented at trial was clearly sufficient to establish that plaintiff's exposure to certain asbestos dust during a specific time period was a substantial factor in causing the mesothelioma. Also, the statutory cap on non-economic damages did not apply since the last known exposure occurred prior to July 1, 1986.

Expert testimony-Evidence -- *Witte v. Azarian*, 2002 WL 1315598 (Md. June 18, 2002). The Court of Appeals broadly construed the law limiting the admissibility of expert testimony for those experts who have not devoted more than 20% of the expert's professional activities to activities that directly involve testimony in personal injury claims. Only when medical examinations, telephone conferences, review of documents and the like are performed in preparation for testifying does the evaluation constitute activity that directly involves testimony. The Maryland legislature's use of the narrower term "directly involve testimony" instead of broader "related to" language was found to be dispositive, since the legislature would not wish to greatly shrink the pool of eligible experts.

Employee Termination-Public Policy -- *Wholey v. Sears Roebuck et al.*, 2002 WL 1335280 (Md. June 19, 2002). Plurality opinion holding that Maryland public policy does favor the investigation and prosecution of crimes, thus a cause of action for the wrongful termination of an at-will employee who reports suspected criminal behavior to police or other judicial authorities does exist. However, public policy does not protect a private employee who is fired for investigating criminal activity or reporting the activity to his supervisors only. The dissenting opinion argued that the employer's discharge here was also contrary to public policy, and that the plurality too narrowly construed the tort of "abusive discharge."

Damages-Post-Judgment Interest -*Carpenter Realty Corporation et al. v. Imbesi*, 2002 WL 1340330 (Md. June 20, 2002). When the original judgment for the plaintiff is reversed on appeal but a subsequent judgment is later awarded, the plaintiff is not entitled to post-judgment interest retroactive to the original judgment. The original judgment had been removed so the post-judgment interest must be

calculated from the date of entry of the subsequent judgment.

MARYLAND COURT

OF SPECIAL APPEALS

Torts-Evidence --*Antoinette Dow et al. v. L&R Properties, Inc.*, 144 Md. App. 67, 796 A.2d 139 (2002). Summary judgment improper where material issue of fact exists as to whether paint in rental home was lead based. Also, circumstantial evidence may support a negligence determination if it amounts to a reasonable likelihood or probability rather than a mere possibility. In Maryland, meager evidence of negligence is sufficient to carry the case to the jury, providing it is not wholly speculative.

Contracts, Evidence - Fraud, Negligent Misrepresentation - *Greenfield, et ux. v. Udo Heckenbach*, 144 Md. App. 108, 797 A.2d 63 (2002). Plaintiff may bring tort actions for fraud or negligent misrepresentation that are based on false, pre-contract promises by the defendant and admit parol evidence even if (1) the written contract contains an integration clause and (2) the pre-contractual promises that constitute fraud are not mentioned in the written contract, and are thus admitted through parol evidence. Furthermore, statute of frauds and merger by deed do not bar a tort suit for either fraud or negligent misrepresentation because those counts are not based “on the contract” between the parties but are based on misrepresentations that induced the contract.

Torts-Civil Procedure -- *Hansen v. Larsen*, 144 Md. App. 201, 797 A.2d 118 (2002). A person is not “absent from the state” merely because he or she does not reside in Maryland. A person will be deemed absent from the state, for statute of limitations purposes, only if he or she cannot be “reached by processes of the court.” This includes persons actually residing in the state.

Torts-Evidence--*Southern Management Corporation et al. v. Mariner*, 144 Md. App. 188, 797 A.2d 110 (2002). Testimony regarding prior fires resulting from clogged clothes dryer was allowed since a similarity in time, place, and circumstances existed. When such a showing of substantial similarity is made, evidence of past accidents, tendencies or defects may be admissible in negligence suit if the trial judge considers that the probative value of the admittance outweighs the dangers of prejudicial effect.

Criminal-Evidence -- *Walker v. State*, 2002 WL 1082334 (Md. App. May 31, 2002). State allowed to impeach its own witness with prior unsworn, inconsistent statement under Rule 5-607 even when state was not “surprised” by the witnesses testimony. Instead, using otherwise inadmissible evidence as a “subterfuge” is the only limit to a party’s impeachment of its own witness under the rule.

Workers Compensation -- *Montgomery County v. George R. Smith*, 2002 WL 1160198 (June 3, 2002). Court of Special Appeals reversed Compensation Commission and Circuit Court grant of workers compensation to off-duty prison guard during basketball game on prison grounds. **The court held that the injury did not “arise out of” his employment, for workers’ compensation purposes, because his job did not require him to be on the basketball court where he was injured. The court also held that the injury did not occur “in the course of” his employment for workers’ compensation purposes. The guard’s injury occurred after his day’s work was finished, he was not fulfilling work-related duties at the time he injured himself, the guard could have exercised virtually anywhere to keep in shape, and the guard was not hired to play basketball.**
Personal Injury-Statutory Interpretation -- *Ford v. Douglas*, 2002 WL 1162913 (Md. App. June 4, 2002). Since one-year statute of limitations applicable to actions for “assault, libel, or slander” is unambiguous and legislative intent is clear, actions for battery fall under the three-year general statute of limitations.

Personal Injury-Evidence -- *Singleton v. Travers*, 2002 WL 1205056 (Md. App. June 6, 2002).

The trial court improperly construed §10-104(c) of the Courts and Judicial Proceedings Article when it granted summary judgment in favor of defendant in automobile accident based on absence of live expert testimony for plaintiff's injuries. A causal connection between a disability claimed by plaintiff and defendant's negligence will require expert testimony only when it involves a complicated medical question involving facts. Otherwise, when causal connection generally relates to matters of common experience, knowledge or observation of laymen, expert testimony to show causation will not be required at all. And, when required, expert testimony used to show causation may be expressed in a written medical report as long as the opinion contained therein is otherwise admissible.

Personal Injury-Retirement Benefits -- *Board of Trustees for the Fire and Police Employers' Retirement System of the City of Baltimore v. Mitchell*, 2002 WL 1301278 (Md. June 14, 2002). The Court of Special Appeals reaffirmed the decision of the Retirement Board granting special disability benefits to the estate of a deceased firefighter. The court held that the firefighter's pancreatic cancer, caused by occupational hazards, was an "injury" under the city's Retirement Act which rendered him totally and permanently incapacitated from further performance of his duties. The case was remanded to determine whether this cancer was a new cancer or whether it developed from an earlier cancer, for purposes of statutory 5-year limitations period for filing a claim for special disability benefits.

DISTRICT OF COLUMBIA COURT OF APPEALS

Landlord & Tenant-Duty of Care -- *Settles v. Redstone Development Corporation*, 797 A.2d 692 (D.C. 2002). Court of Appeals upheld a grant of summary judgment to the defendant landlord, holding that the landlord was not liable for an injury occurring on the leased premises on which no measure of control was exercised by the landlord. The premises was deemed to be in exclusive control of the tenant, despite the fact that landlord was on notice that the tenant might be in violation of air conditioning service. Liability for third-party injury will not be imposed on landlord for every lease violation by a tenant, except for situations in which a tenant maintains an extremely dangerous instrumentality.

Statutory Interpretation-Notice-Sovereign Immunity -- *Dingwall v. District of Columbia Water and Sewer Authority*, 2002 WL 1065905 (D.C. 2002). The *en banc* court reinstated a prior panel decision holding that a plaintiff is not required to provide notice of suit to the D.C. Water and Sewer Authority (WASA) in a suit for negligence. Section 12-309 of the D.C. Code, which requires pre-suit notice to the Mayor in an action against the District, does not apply to WASA. The court relied on language in WASA's charter referring to it as a corporate body with a separate legal existence within the District government. The court also cited §43-1672(b) of the D.C. Code, and concluded that since WASA is "subject to" all the laws of the District, it is subordinate to, and bound by, the laws applicable to other District instrumentalities.

U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

Copyrights and Intellectual Property -- *Nelson-Salabes Inc. v. Morningside Development LLC and G. Neville Turner*, 284 F.3d 505 (4th Cir. 2002). In a case of first impression for the 4th Circuit, the court affirmed a \$736,000 award for the architectural firm Nelson-Salabes while rejecting the developer's argument that the firm granted them an "implied nonexclusive license" to use the firm's drawings after another architect was hired. The implied license argument was used as an affirmative defense to copyright infringement. However, while the court affirmed the amount of the award, it found joint and several liability improper because the award was not based on the firm's damages, but on the defendant's profits. The court vacated and remanded since no finding had been made that defendants were engaged in a "practical partnership," a finding necessary for a profit-based award under copyright

law.

ADA-Wrongful Discharge -- *Pollard v. High's of Baltimore*, 281 F.3d 462 (4th Cir. 2002). The lower court was correct in holding that a woman with a back injury that was believed to be temporary was not disabled under the Americans with Disabilities Act. Later certification by her physician that her injury was and had been permanent did not change analysis under the ADA, under which temporary impairments are presumed not to be covered but are analyzed on a case-by-case basis. Here, the worker failed to show that she was substantially impaired in a major life activity, even if “working” is considered a major life activity, because she immediately obtained other employment after leaving the defendant company.

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