

# 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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## *Recent Developments*

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## **MARYLAND COURT** **OF APPEALS**

**Insurance broker liability - Contracts** -- *International Brotherhood of Teamsters v. Willis Corroon Corp. of Maryland*, 2002 WL 1587489 (Md. July 18, 2002). The Court of Appeals reversed the grant of summary judgment to the defendant insurance broker and remanded, holding that when an insurance broker is employed to obtain an insurance policy that covers certain risks and subsequently fails, an action may lie against the broker either in contract or in tort.

The union had filed a claim to the insurer believing that the acts of all the union representatives would be covered, as was required by federal law. However, it was discovered that the insurance policy

procured by the broker provided insufficient coverage. The court held that the union did not have a duty to read the policy obtained for it, but rather has a duty to act reasonably under the circumstances, which may or may not require the insured to check parts of the policy and accompanying documents. Since this duty of the insured involved questions of fact, summary judgment was improper.

**Civil Rights - Injunctive Relief** -- *State of Maryland Commission on Human Relations v. Talbot County Detention Center*, 2002 WL 1611629 (Md. July 23, 2002). The circuit court had denied an injunction to the Commission on Human Relations which sought relief **against the county detention center to stop the center from interfering with the Commission's preliminary investigation of two complaints of employment discrimination against the detention center. The Court of Appeals reversed, first deciding that** the circuit court had jurisdiction to enter an injunction and then ordering the circuit court to do so. The court held that the Commission's investigation was thwarted when the detention center insisted that it be allowed to be present at and record preliminary interviews and investigations with witnesses conducted by the Commission. The court also held that the presence of the detention center at the interviews would likely have the effect of intimidating or influencing witnesses and frustrating the truth-seeking and confidential nature of the investigative process.

**Workers Compensation** -- *Carey v. Chessie Computer Services*, 2002 WL 1587491 (Md. July 18, 2002). The Court of Appeals vacated the order of the Court of Special Appeals and two circuit court grants of summary judgment, in favor of reinstating a 1996 Workers' Compensation Commission decision awarding a claimant disability benefits. First, the Court of Appeals held that the trial court committed reversible error when it granted the claimant partial summary judgment, since, according to statute, after the Subsequent Injury Fund (SIF) was impleaded, the case should have been immediately remanded back to the Commission. But, since the initial grant of summary judgment was never appealed, that grant was binding and not subject to further review by a second circuit court hearing or the Court of Special Appeals.

Lastly, in dicta, the Court of Appeals considered the procedures used to implead the SIF, and adopted a three-step procedure. A party seeking the impleader must: (1) use and comply with procedures set forth in COMAR; (2) make certain that the required state officials are notified as required by state law; and (3) file with the court and all other parties a written notice of impleader attesting that those two procedures have been followed.

### MARYLAND COURT OF SPECIAL APPEALS

**Landlord-Tenant** -- *Hemmings v. Pelham Wood LLP*, 144 Md. App. 311, 797 A.2d 851 (2002). The Court of Special Appeals affirmed the trial court's grant of summary judgment to the owner and property manager of an apartment building after a tenant had been murdered in his apartment unit. The court held that, in accord with the rule that a landlord is not ordinarily liable to tenants for injuries from hazardous conditions that arise after the tenants have taken possession, no special duty is imposed on the landlord to protect tenants from third party crimes. A duty would be imposed, however, if the landlord had knowledge of an increase in criminal activity on the premises and failed to undertake reasonable measures to keep the premises secure.

**Pretrial procedure - Discovery** -- *Hossainkhail v. Gebrehiwot*, 143 Md. App. 716, 795 A.2d 816 (2002). The Court of Special Appeals affirmed an order dismissing with prejudice a claim for negligence against multiple defendants. The trial court did not abuse its discretion in entering the dismissal the order since the plaintiff failed to timely respond to multiple discovery deadlines and express court orders compelling discovery. It was also within the trial court's discretion to dismiss the claim against a discovering but non-moving party, because the conduct of the plaintiff was so

offending. The court is authorized to sanction such inaction based upon the ability of a court to protect its process.

**Medical Malpractice - Patient-Physician Relationship** -- *Sterling v. Johns Hopkins Hospital*, 2002 WL 1401872 (Md. App. July 1, 2002). Husband of patient who died from complications due to pregnancy brought suit against medical center that had agreed to accept the transfer of the unstable patient. The Court of Special Appeals affirmed the grant of summary judgment in favor of the medical center. The accepting hospital did not owe to the patient the same duty of care as the transferring hospital, since the accepting hospital was not currently treating the patient and had not established a responsibility towards her. The duty remains with the transferring hospital and attending physician, who can examine the patient first-hand and make informed decisions as to proper medical treatment. The court noted that an on-call physician still has a duty of care anytime he/she conveys a medical opinion or other directive that indicates an affirmative action in assuming whole or partial responsibility in the care and treatment of a patient.

**Insurance - Product liability - Asbestos litigation** -- *Mayor and City Council of Baltimore v. Utica Mutual Insurance Company*, 2002 WL 1419622 (Md. App. July 2, 2002). In the continuing litigation between the City of Baltimore and the insurers of asbestos installers, the Court of Special Appeals affirmed and vacated grants of summary judgment to insurers of asbestos installers. The court first affirmed multiple summary judgments, holding that the product hazard exclusion contained in the policies applies to claims of negligent failure to warn. The court also vacated a judgment, holding that the injury-in-fact/continuous trigger of coverage applied to long-term and continuous damage posed by the installation and continued presence of asbestos in buildings.

Thus, a comprehensive general liability (CGL) policy which took effect after manifestation of the injuries could still cover the liability of the asbestos installer, provided that primary insurance coverage had been exhausted. The court also held that continuous or progressive damage from asbestos-containing materials will constitute an "occurrence" within a CGL policy. However, the court decided that liability for the damages claimed would be allocated on a pro rata basis among triggered primary insurance policies and periods of self-insurance.

**Administrative law and procedure - Evidence** -- *Angelini v. Harford County*, 144 Md.App. 369, 798 A.2d 26 (2002). A county board of appeals decision denying a zoning extension was affirmed by the circuit court and again by the Court of Special Appeals. The intermediate appellate court found that the zoning decision was entitled to judicial deference usually given to an agency with special expertise, and that the agency's interpretation and application of the agency administered statute was properly given considerable weight by the trial court. Moreover, although the landowner met her burden of production before the agency, she failed to meet her burden of persuasion, a critical and rudimentary distinction, and was not otherwise entitled to a decision in her favor.

**Property - Contract** -- *Calvert Joint Venture #140 v. Snider*, 144 Md. App. 250, 797 A.2d 816 (2002). In a dispute between purchasers of surface property and the sellers who retained subsurface ownership, the Court of Special Appeals affirmed the circuit court judgment in favor of sellers, holding that the land installment contract showed an intent of the subsurface property owners to have the right of ingress and egress to the subsurface property. The court drew from an Arizona case which recognized that, for both surface and mineral rights estates to coexist and retain their individual value, some accommodation between the respective owners is necessary. Further, that if a right to the subsurface minerals is established, there is no need for an express reservation of ingress and egress, and, absent mistake, fraud, or other inequitable conduct, the trial court was without authority to reform a valid and unambiguous contract.

**Negligence - Medical Malpractice - Burden of proof** -- *Mayer v. North Arundel Hospital Association*, 802 A.2d 483 (Md. App. 2002). The Court of Special Appeals affirmed the grant of summary judgment to the defendant hospital after a three year old suffered severe and permanent brain damage, despite the plaintiffs contention that the jury should have been permitted to consider whether negligent acts were committed after a certain time, and not merely prior to that time. The court held that there was no testimony offered as to a specific breach of standard of care after the designated time, and that generalized statements criticizing conduct are not the equivalent of such testimony. Further, since the plaintiffs presented no evidence showing that the harm was indivisible, which would have made defendants potentially liable for the entire harm, there was no question which should have been submitted to a jury.

**Insurance coverage - Policy term interpretation** -- *Callaway v. MAMSI Life and Health Insurance Company*, 2002 WL 1377771 (Md. App. June 26, 2002). The Court of Special Appeals rejected a prior holding of the 4th Circuit Court of Appeals and reversed the circuit court's grant of summary judgment to defendant insurer which had relied on that holding. Maryland has adopted the rule that death by autoerotic asphyxiation is indeed an accident and is not intentional, thus allowing the insured to recover accidental death benefits. The court stated that while this type of risky behavior may lead to a fatal mistake, it cannot be regarded as an intentional, self-inflicted injury.

#### **U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT**

**Product liability - Expert testimony** -- *Cantrell v. Weber-Stephens Products Co., No. 01-1045*, (4th Cir. 2002). The Fourth Circuit upheld the District Court's grant of summary judgment in favor of the defendants since the plaintiffs produced no direct evidence, which could have been in the form of expert testimony, of a defect in a gas grill which exploded and caused injury. Applying Maryland tort law, the court held that without such testimony, a jury could only infer the presence of a defect in the grill by engaging in "surmise, conjecture, or speculation." Also, the doctrine of *res ipsa loquitur* could not apply, since the gas cylinder and grill was sufficiently outside of the defendant's control.

**Federal civil procedure - Disability insurance** -- *Mardirossian v. Paul Revere Life Insurance Company*, 286 F.3d 733 (4th Cir. 2002). The Fourth Circuit vacated a district court grant of summary judgment to defendant insurance company, which had resisted a claim for specific performance on a oral contract for disability coverage. Because the district court had not reached the merits of the plaintiff's claim, and had merely based its ruling on the exhaustion requirement, the appellate court could not properly dispose of the case. Instead, the Fourth Circuit vacated the judgment and remanded the case to the district court with instructions to certify to the Maryland Court of Appeals the question of whether Maryland law provides a cause of action for specific performance on an oral contract for disability insurance entirely independent of the Maryland Insurance Code.

#### **DISTRICT OF COLUMBIA COURT OF APPEALS**

**Civil procedure - Forum non conveniens** -- *Nixon Peabody LLP, et al. v. Beaupre*, 791 A.2d 34 (D.C. 2002). In an interlocutory appeal, the District of Columbia appellate court upheld an order denying a motion to dismiss a breach of contract and wrongful termination suit for *forum non conveniens*. Applying an abuse of discretion standard of review, the appellate court held that the trial judge appropriately considered all the relevant private and public interest factors, and arrived at reasonable conclusions. Significantly, the trial court had found that since much of the alleged tortious conduct and breaches of contractual and professional duties were committed by attorneys practicing in the District of Columbia, the case was not one of foreign jurisdiction.

## **CIRCUIT COURT OF VIRGINIA**

**Insurance - Sexual Assault** -- *Rockingham Mutual Insurance v. Davis*, 2002 WL 737474 (Va. Cir. Ct. April 26, 2002). The Court held that the intentional tort exclusion in a homeowner's insurance policy applied to a sexual assault and battery of a third party by the insureds, and held that there was no duty to defend the insureds in suits against them. The Court first agreed with the insurers' contention that an "occurrence," as defined in the policy, only applied to accidents or unexpected incidents, as seen from the viewpoint of the insured, and thus excluded intentional torts. Second, in an issue of first impression, the court held that an employer can be liable for his employee's intentional torts under the doctrine of respondeat superior even when there is no allegation that the employer expected, intended, or ratified those torts. The employer is still ultimately being held liable for an intentional tort, and not a tort sounding in negligence, and a tort which was intentional when committed cannot be unexpected, even when viewed from the viewpoint of the employer. Lastly, the tort does not become an "occurrence" of the employer simply by operation of respondeat superior.

## **U.S. DISTRICT COURT, WESTERN DISTRICT OF VIRGINIA**

**Wrongful termination - Federal Civil Procedure** -- *Lawrence w. Hanson*, 197 F.Supp.2d 533 (W.D. Va. 2002). In a decision that creates a split in Virginia's two federal districts, the court held that a plaintiff may serve a defendant after the state time limit for service has expired when the case has been removed to a federal court. Once a case has been removed to federal court, state law governing service of process is no longer applied, even to activity that occurred prior to removal. The judge allowed the additional time for service stating that it is the defendant who makes the decision to remove the case to federal court, which thus restarts the clock. To avoid an extension of the service deadline, a defendant should try to have the case dismissed in state court before removal.

*For full text of the above opinions, click on [www.courts.state.md.us](http://www.courts.state.md.us), [www.dcca.state.dc.us](http://www.dcca.state.dc.us), [www.uscourts.gov](http://www.uscourts.gov), or e-mail [schmielerj@sslawfirm.com](mailto:schmielerj@sslawfirm.com)*

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