

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

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MARYLAND COURT OF APPEALS

Statements Regarding Prior Malpractice Litigation is Prejudicial -- *Lai v. Sagle*-- 2003 WL 931952 (March 10, 2003.)

The estate of a deceased patient sued a doctor who removed a gangrenous gallbladder from her, alleging negligence in the procedure. During the opening statements of the trial, the personal representative's counsel mentioned five prior suits that had been filed against the doctor for medical malpractice in another state. Counsel for the doctor requested a mistrial after noting his objection to the opposing counsel's opening statement remark, and persisted in his objection despite the trial court's proposed remedy of giving a series of supposed curative instructions to the jury. He continued to object until cut-off by the trial judge, signaling the end of discussion on that issue at the trial. The lower court entered judgment against the defendant doctor in the amount of \$131,500.

On appeal, the Maryland Court of Appeals found that the doctor's counsel did all that was required, under the circumstances, to preserve the issue for appeal. Furthermore, the court held that the trial court abused its discretion by failing to grant the doctor's motion for a mistrial after the references to the prior malpractice actions were given to the jury. The court noted that they were creating somewhat of a "brightline" rule that evidence of prior malpractice litigation should be excluded to prevent a jury from concluding that the doctor has a propensity to commit medical malpractice.

Discovery in Administrative Proceedings -- *Hammen v. Baltimore County Police* -- 2003 WL

1145440 (March 14, 2003.)

The appellant employee, a police officer, was on disability when reports were made that he was actively serving with a volunteer fire department. Surveillance tapes were made and the employee made a Maryland Public Information Act (“MPIA”) request to obtain copies of the tape. The Baltimore County Office of Law conditioned disclosure upon the employee's submission to a deposition. Following a hearing on the matter, the Circuit Court for Baltimore County issued an order finding that the tapes were precluded from disclosure, upholding the Office of Law’s denial of the appellant’s request.

On appeal, the Maryland Court of Appeals held that a person could invoke the MPIA to gain access to a relevant surveillance videotape which the person might not have been able to access under the traditional discovery rules. The court first noted that it would decide the case, despite its mootness after the employee saw the tapes, because the issue was an unresolved issue of public concern capable of repetition yet evading review. Absent a statute to the contrary, the rules of discovery applicable to circuit court proceedings were not, generally, applicable to MPIA proceedings. A party to an administrative proceeding, pursuant to a proper MPIA request, could not be required to submit to a deposition before receiving surveillance videotapes to which he was statutorily entitled because the MPIA allowed broad access to public records, particularly where the records sought involved the requesting citizen. The court subsequently vacated the judgment of the Court of Special Appeals and instructed the circuit court to dismiss the action.

Collateral Order Doctrine-- *In re Sophia E. Foley*-- 2003 WL 1787642 (April 4, 2003.)

Sister of 62-year old woman suffering from dementia filed guardianship petition, seeking appointment as co-guardian over woman, with woman's husband, and seeking to have woman tested for Lyme disease. The Circuit Court for Anne Arundel County, granted a motion for a physical examination and the husband appealed. The Court of Special Appeals vacated the order and the sister petitioned for writ of certiorari.

After granting the petition, the Court of Appeals held that the discovery order was not appealable under the collateral order doctrine for two reasons: (1) the discovery order for examination was not completely separate from merits of guardianship controversy, and (2) the discovery order would not be effectively unreviewable if the appeal had to await the entry of a final judgment in controversy. The court noted that Maryland recognizes four requirements for the collateral order doctrine to be applicable. The two elements listed above were not met and therefore, the order was not appealable at this time in the proceedings.

Civil Procedure: Discovery Rule for Statute of Limitations – *American General Assurance Company v. Pappano*, – 2003 WL 21005007 (May 6, 2003.)

Husband and wife (the Pappanos) took out a home equity loan from Chevy Chase Bank. They decided to take out a joint insurance policy offered by an insurance group through Chevy Chase which would pay the outstanding balance of the loan in the event of death of either spouse. Mr. Pappano died in August of 1996 and Ms. Pappano did nothing to investigate the credit life insurance matter until the Spring of 1997. Chevy Chase then informed Ms. Pappano that there was no insurance that applied to the home equity loan. Ms. Pappano did not further investigate until 1999 when she sold her home and received a letter from Chevy Chase indicating that she needed to pay the remainder of the home equity loan. Chevy Chase told her that the credit life insurance was on her life alone - not her husbands, and

therefore could not be applied to the outstanding balance.

She brought suit against Chevy Chase claiming that the bank negligently failed to provide credit life insurance on her husband's life in connection with the loan. Chevy Chase moved for summary judgment and argued that Ms. Pappano's claim was barred by Maryland's general statute of limitations (Maryland Code § 5-101) which requires a civil action to be filed within three years after the date it accrues. The bank argued that Ms. Pappano was on inquiry notice of her claim for credit life insurance when her husband died in August of 1999 and that because she waited until December of 1999 (more than three years) her claim was time barred. The Court of Appeals found that the issue could not be resolved on summary judgment because there was a fair question whether the plaintiff had sufficient information more than three years prior to filing suit to put her on inquiry notice and whether her delay in making inquiry of the bank was reasonable.

Municipal: Action Taken by County Council Without County Executive – *Montgomery County, Maryland v. Anchor Inn Seafood Restaurant* – 2003 WL 2006928 (May 2, 2003.)

Montgomery County Council passed a bill that banned smoking in licensed bars and restaurants in Montgomery County. The bill was delivered to the County Executive who vetoed it. On the same day, the County Council purported to convene as the Board of Health and adopted a resolution that was identical to the bill earlier vetoed by the County Executive.

Several respondents, including the Anchor Inn Seafood Restaurant, challenged the validity of the resolution on the basis that the County Council did not have the authority to act as the Board of Health without the participation of the County Executive. The Court of Appeals agreed with the respondents and held the resolution invalid.

Administrative Law: Application of the Accardi Doctrine-- *Pollock v. Patuxent Institution Board of Review* -- 2003 WL 21026745 (May 8, 2003.)

An inmate in an alternative program for youthful eligible persons at a correctional institution contended that the positive urinalysis drug test results of a sample supplied by the him should have been excluded from evidence at his parole revocation hearing due to the failure of the staff of the institution to strictly comply with its own directive setting forth technical collection and documentation procedures for urinalysis samples. The Circuit Court for Howard County denied relief and the Maryland Court of Special Appeals affirmed.

On appeal, the Court of Appeals affirmed the lower court's holding that the institution's directive that was violated not only implicated the Accardi doctrine, but also implicated the Accardi doctrine exception. The Accardi doctrine requires that a government agency generally observe rules, regulations or procedures that it has established. However, it does not apply to an agency's departure from purely procedural rules that do not invade fundamental constitutional rights or are not mandated by statute, but are adopted primarily for the orderly transaction of agency business.

In *Pollock*, the institution's directive merely provided for the orderly transaction of the institution's business of collecting and handling urine specimens. The directive implicated no fundamental constitutional rights and was not imposed on the agency by statute. Moreover, the inmate was not prejudiced in the way the sample was handled and by the board's consideration of the positive urinalysis sample which was submitted by him. The institution's staff were generally following the directive, but

committed purely technical infractions. Therefore, the probationer failed to demonstrate prejudice from the infractions.

Labor and Employment, Public Policy Exception to At-Will Doctrine -- *Porterfield v. Mascari II, Inc.* -- 2003 WL 21026747

(May 8, 2003.)

A terminated employee brought an action against her former employer, its operators, and its co-owner and manager, claiming she was wrongfully discharged. After being placed on warning, the at-will employee suggested she might consult an attorney before acknowledging the warning, and was fired almost immediately. In upholding the dismissal of the subsequent wrongful discharge action, the high court adhered to the Maryland rule that left definition of public policy to the legislature in most situations. While the lower courts should not have suggested that dismissal was in part for failure to articulate the claim with particularity, because the complaint was actually quite clear, they were correct in holding that Maryland law, while favoring opportunities to consult with an attorney, had never recognized a clear public policy mandate protecting the right to consult with an attorney in a civil setting so as to give rise to a cause of action for wrongful discharge. The most apposite case law in Maryland had refused to recognize a public policy wrongful discharge cause of action on the part of an employee who had been fired for suing the employer. If the right to sue did not rise to the level of a clear mandate, neither did the right to consult an attorney.

Civil Procedure, Application of the Absolute Privilege-- *Reichardt v. Flynn* -- 2003 WL 21026754
(May 8, 2003.)

A public school teacher filed an action against two students and their parents, alleging they defamed him by fabricating and communicating to the principal and other school officials false and malicious allegations of sexual abuse, harassment, and discrimination, and that they tortiously interfered with his economic relationship with the public school system. The students alleged that an absolute privilege applied to the defamation action. The Circuit Court for Montgomery County granted the students' and parents' motion to dismiss with prejudice. The teacher appealed the dismissal of the defamation claim and the Court of Special Appeals reversed. The Maryland Court of Appeals held that the intermediate court improperly found inadequate procedural safeguards to minimize the occurrence of defamatory statements. The court ruled that the teacher could appeal his dismissal to the county school board and to the Maryland State Board of Education and that he also had a right to a second appeal to the Maryland State Board of Education, a right to a hearing, and a right to judicial review of the State Board's final administrative decision. The State Board and judicial review proceedings were governed by the Maryland State Administrative Procedure Act. The criticism of the procedural safeguards in that the defamation had occurred in the students' initial complaint was rejected, as it would apply to all cases in which a complaint was made about government personnel, where the complaint initiated an administrative proceeding. The trial court correctly held that the defamation action was barred by an absolute privilege.

Workers' Compensation: Injury Arising Out of and in the Course of Employment -- *Livering v. Richardson's Restaurant* -- 2003 WL 21038614 (May 9, 2003.)

The appellant employee was employed by appellee restaurant. The owner of the restaurant posted a weekly work schedule several days in advance, yet tended to change the schedule occasionally. When

the owner changed the schedule, he tried to call or visit the affected employee. The appellant did not have a telephone and so she visited the restaurant while in the course of running personal errands in order to make sure that her work schedule had not changed. After checking the schedule, and upon departure from the restaurant the employee slipped and fell on the ramp outside the restaurant door, injuring her wrist. The Workers' Compensation Commission determined that the claimant's accidental injury did not arise out of and in the course of her employment. The Circuit Court for Washington County following a bench trial, affirmed the commission's findings.

The Maryland Court of Appeals reversed, finding that the employee's injury arose out of and in the course of employment pursuant to Md. Code Ann., Lab. & Empl. §§ 9-101(b)(1) (1999 & Supp. 2002). The court held that because the employee was required to be on time for work and to know her schedule, and because the owner often changed the schedule, the employee's act of checking her schedule was incident to her employment, and her injury resulted because of her employment. Therefore, the employee would not have been injured but for the fact that she visited the restaurant to confirm her schedule.

Alternative Dispute Resolution: Consent Order as Superceding Arbitration Agreement -- *Allstate Insurance Company v. Stinebaugh* -- 2003 WL 21053914 (May 12, 2003.)

Appellee insured argued that he had not agreed to arbitrate a dispute with the company that insured a driver that hit him from behind. The trial court initially granted the motion to compel arbitration, but then reconsidered and denied the motion. The insurer contended that a written agreement between itself and the appellee required arbitration.

The Maryland Court of Appeals held that a trial court was to determine whether a consent order took precedence over an arbitration agreement. In the instant case, the consent order clearly called for a resolution of the negligence claim in court. The dispute did not require that the trial court delve into the merits, but concerned the applicability of the prior arbitration agreement in light of the subsequent consent order. The trial court properly concluded that the consent order discharged the prior arbitration agreement by a substituted performance. The consent order also unambiguously provided that the liability determination was to occur at the trial, or under a mutually agreed-upon settlement. Furthermore, the consent order superseded the arbitration agreement and discharged any right to arbitrate the controversy and could also be viewed as modifying the prior arbitration agreement.

Civil Procedure: Immunity for Reporting Suspected Child Abuse

Rite Aid Corporation v. Dexter Hagley -- 2003 WL 21058334 -- (May 13, 2003.)

A father dropped off photographs that his wife had taken of the father and his son in a bathtub. The employee in the drugstore's film department who developed them thought some of the pictures may suggest child sexual abuse. He consulted with a supervisor and a subordinate, as well as a security person and decided to hold the film until an investigation could take place to determine if the pictures were harmless. No charges were ever filed, but the father was questioned extensively by police, and the child was in foster care for two days. The Circuit Court for Baltimore City granted summary judgment for the store and its manager, the father appealed. The Court of Special Appeals ruled that certain claims were appropriately resolved on summary judgment, vacated judgment as to defamation claim, and remanded the case. The store and manager filed a petition for writ of certiorari and the father filed a cross-petition.

The Maryland Court of Appeals held that the immunity for good faith reporting of child abuse provided by Md. Code Ann., Cts. & Jud. Proc. §§ 5-620 (2002) and Md. Code Ann., Fam. Law §§ 5-708 (1999) was intended to be broadly applied to anyone who acted with an honest, proper motive to protect a child, even if negligently. Since all the employee's actions were undertaken with the honest intent to determine if the pictures indicated reportable child sexual abuse, the actions were privileged under the Maryland laws. As there was no material dispute of fact, summary judgment was appropriate, even in a case involving determinations of good faith.

MARYLAND COURT OF SPECIAL APPEALS

Tort Recovery -- *Sherrod v. Achir* – 2003 WL 554744 (February 28, 2003.)

Appellants' car was struck in the rear by a vehicle driven by appellee driver, a courier, while in Maryland. Appellants, who were residents of the District of Columbia and insured by a policy issued there, brought an action against the driver, his employer and the president of the company, alleging that the driver was negligent and that he was acting as agent, servant, and employee of the other appellees at the time of the accident. Appellants filed a claim with their insurer under the personal injury protection (PIP) coverage of their policy, which was eventually paid by the insurance company. Appellees filed a summary judgment motion claiming that the matter was barred by the District of Columbia Compulsory/No-Fault Motor Vehicle Act, which was granted.

On appeal, the Maryland Court of Special Appeals reversed, holding that the election by appellants to obtain PIP coverage from their insurer did not bar their action against appellees because the Act was part of the substantive law of torts of the District of Columbia. Under Maryland's substantive tort law, which was controlling under the *lex loci delicti* doctrine, the Act did not bar the claim.

Employment Discrimination -- *State of Maryland Commission on Human Relations v. Kaydon Ring & Seal* -- 2003 WL 660936 (March 3, 2003.)

In 1994, a Jamaican employee filed an employment discrimination complaint against his employer, defendant Kaydon Ring and Seal (“Kaydon”), alleging that Kaydon had discriminated against him by terminating his employment on the basis of race and national origin. Plaintiff, State of Maryland Commission on Human Relations, offered evidence to the Office of Administrative Hearing that similarly situated employees had been treated differently than the employee who filed the complaint. Specifically, one of the employees who had a similar low productivity record had actually been transferred into a new position, where complaining employee had been dismissed. Evidence was also introduced that the firing supervisor frequently became more upset and irritated with black employees than he did with white employees.

Over the course of three different appeals of findings and recommendations of the Commission's administrative law judge (ALJ), the Appeal Board of the Commission repeatedly found that the employer discriminated against the employee. However, the ALJ noted that although discrimination was present, the employee was fired for other, non-pretextual reasons. Following the ALJ appeals, Kaydon filed an action in the Circuit Court for Baltimore City for a judicial review and motion to stay enforcement of the administrative order. The Circuit Court granted the motion to stay and in February of 2002, issued a decision reversing the Appeal Board of the Commission's decision and entering judgment in favor of Kaydon.

The Court of Special Appeals held that, on review, pursuant to Md. Code Ann., State Gov § 10-222, the trial court should only have looked to whether the administrative decision was supported by substantial evidence. Reviewing that same decision according to the substantial evidence standard, the appellate

court held that the ALJ failed to make sufficient factual findings to enable the Appeal Board of the Commission to make its own informed decision, as many of the findings that the ALJ should have made involved credibility determinations that the Commission could not make on a cold record. Nevertheless, instead of remanding the matter to the ALJ for further fact finding regarding alleged preferential treatment of a white employee and harsh treatment of African American employees, the Commission made its own findings, unsupported by substantial evidence. Therefore, the appellate court remanded the case to the Commission with instructions to remand back to the ALJ for further factual findings on the issue of disparate treatment and whether such treatment may have been the basis for the employee's dismissal.

Jury Instructions Regarding Underinsured Policy -- *Boone v. American Manufacturers Mutual Insurance Company* -- 2003 WL 1559895 (March 26, 2003.)

Appellants were involved in an automobile accident in which one of the passengers in the vehicle sustained an injury. Appellants obtained a settlement for the maximum amount allowed under the policy of the tortfeasor. They subsequently attempted to collect additional damages from their own insurance company under an underinsured provision in their policy. The trial court told the jury that the case involved a claim for underinsurance coverage due to an alleged "deficit" in the injured party's recovery from the tortfeasor, but did not instruct them that the recovery from the tortfeasor would be deducted from the verdict. The jury awarded the appellants an amount that did not exceed the damages already recognized. Therefore, appellants' appeal on the grounds that the jury was improperly instructed.

The appellate court held the jury may have been confused as to whether it was to award compensation as a supplement to the recovery from the tortfeasor, or, instead, to award damages as if nothing was recovered from the tortfeasor. The jury's ignorance as to the deduction from its verdict of any recovery from the tortfeasor could have affected its understanding of the value to the injured party of any damages it awarded. The appellate court held that it was unlikely the jury knew it awarded nothing. Given uncertainty as to what the jury intended, the instructions were incomplete; the court did not clearly advise the jury to assess damages as if the injured party obtained no other recovery. It could not be determined if the jury's verdict was an assessment of total damages, or a desire to supplement a "deficit." The trial judge was to fashion an instruction making clear to the jury how it was to assess damages. The decision of the lower court was thus reversed and remanded for further proceedings.

Statute of Limitations on Conditional Gifts and Deeds of Trust-- *Brycke v. Ver Brycke*-- WL 1562292 (March 27, 2003.)

Plaintiffs, two parents, transferred \$ 200,000 to their son and daughter-in-law in 1992, to help them purchase a house that occupied the property next to them. Both parties were aware that the money was provided by the parents in exchange for the defendants moving onto the property to look after the plaintiffs in their old age. The parents transferred \$ 40,000 by giving their son and daughter-in-law four checks in the amount of \$ 10,000 each so that the money would be considered a gift under the tax code. The parents also accepted 16 promissory notes and a deed of trust to secure the remaining \$ 160,000. The son and daughter-in-law never occupied the property, and after the son filed a divorce action against the daughter-in-law, the parents filed an action seeking return of the \$ 200,000. When the son and daughter-in-law sold the property to a third party for \$ 980,000, the parents demanded part of the profits they made on that sale.

The appellate court first held that the \$ 40,000 that the parents transferred to the defendants was a gift, and therefore the parents were barred by the statute of limitations from recovering that amount. The court ruled that even though the gift was conditional on the defendants actually moving onto the

property, it was still subject to Maryland's statute of limitations law. The clock in this case began to run when the defendants failed to move onto the property.

However, the remaining \$160,000 was recoverable under Md. Code Ann., Cts. & Jud. Proc. § 5-102 (2002), which sets a 12-year statute of limitations for a promissory note or other instrument under seal. When the parents learned before 1995 that the defendants would not live at the property, they elected to forbear from exercising their right to sue, but they still had the right to rely on the security of their deed of trust. As reflected in the language of the deed of trust, the defendants agreed that the Ver Bryckes could obtain repayment of \$160,000 out of any proceeds from the sale of the property. Pursuant to that agreement, the Ver Bryckes' action on the deed of trust, which is an instrument under seal, could be brought within 12 years after it accrued.

Finally, the trial court did not err by denying the parents prejudgment interest or by refusing to compel disgorgement of the profits.

Worker's Compensation: Joint Tortfeasors – *Saadeh v. Saadeh* -- 2003 WL 1610809 (March 28, 2003.)

The plaintiff worker, employed at his family's restaurant, was attacked by a customer who was unsatisfied with his food order. The customer's father was also present, though it was not clear whether he participated in the altercation. The worker sued the customer, and eventually reached a settlement with him, without notifying the workers' compensation insurer. When the worker suffered additional medical problems allegedly resulting from the attack, he sought a workers' compensation award, arguing that he was not barred under the election of remedies provision of Md. Code Ann., Lab. & Empl. §§ 9-901 (1999), because he had not settled with all the tort-feasors involved. The worker argued that the customer's father, by holding back a co-worker who sought to come to the worker's aid, had committed the tort of aiding and abetting an assault, and that claim was still outstanding. The Circuit Court for Anne Arundel County granted summary judgment in favor of the employer and the worker's compensation insurer.

The appellate court agreed with the trial court that substantial evidence in the record supported the workers' compensation commission's determination, which it was empowered to make under the circumstances, that the father had not participated in the attack, but was simply trying to keep the fight from expanding. Therefore, no tort claims remained and any recovery of worker's compensation was barred since the claim was settled between the employee and the attacker.

Exclusion of Salary Overpayment from Insurance Policy-- *ABC Imaging of Washington, Inc. v. Travelers Indemnity Company of America* -- 2003 WL 1618159 (March 31, 2003.)

Plaintiff employer mistakenly paid an employee \$52,432.32 over the amount he was entitled to receive as his salary. When confronted about the discrepancy, the employee ran and the employer was never able to recover the overpaid salary directly from him. Therefore, the employer attempted to collect the amount from defendant insurance company. Defendant denied the claim, asserting that the manner by which the funds came into the employee's possession fell within the "salary" exclusion of the policy. The circuit court entered summary judgment in favor of the insurance company.

On appeal, the insured argued that the fidelity bond insuring against loss from employee dishonesty required payment of its claim for the overpayment of the employee's salary. The appellate court held that under the policy's salary exclusion, proof of the employee's "manifest intent" to cause loss to the employer was required. Further, proof was required that the employee, by his dishonest actions, obtained a benefit for himself "other than salaries, etc." The employee's acts were clearly "dishonest"

and done with the intent to confer a benefit upon himself. However, the insured's claim that the only monies paid to the employee were the monies due him, and not the overpayments, was rejected.

In a matter of first impression, the appellate court agreed with the majority of courts in its sister states that had held that the same, or similar, policy language was unambiguous and excluded coverage when the only financial benefit gained by the dishonest employee was additional salary or commissions to which the employee was not entitled. The additional monies paid to the employee were not the result of an overt dishonest act by the employee, but the result of an error by the insured or its agent. Therefore, the decision of the lower court was affirmed.

UNITED STATES COURT OF APPEALS, FOURTH CIRCUIT

Non-Permissive Motor Vehicle Users -- *Mutual Benefit Insurance Company v. McDonald* -- 2003 WL 1521933 (March 25, 2003.)

The defendant driver was operating a motor vehicle that was involved in an accident in June of 2000. The district court entered judgment in favor of the plaintiff insurance company on the grounds that the defendant was a non-permissive user of the vehicle. On appeal, the United States Court of Appeals for the Fourth Circuit affirmed the decision of the lower court holding that since the driver was operating the vehicle under the influence of alcohol in violation of the insurance policy, he was thus a non-permissive user of the vehicle.

UNITED STATES DISTRICT COURT,, DISTRICT OF MARYLAND

Insurance Defense -- *Applied Signal & Image Technology v. Harleysville Mutual Insurance* -- 2003 WL 1549968 (March 14, 2003.)

The plaintiff ("ASIT") was engaged in the business of signal and image processing technology for government and commercial contracts. In July of 2001, an employee sued ASIT alleging various illegal corporate activities as well as a claim for "false light." The defendant insurer issued a policy to the plaintiff that covered personal injury arising out of the its business. The policy covered certain defamation and privacy claims. Plaintiffs notified defendant of the suit and requested defense under the policy. The policy, however, contained an "Employment Related Practices Exclusion" stating that the coverage did not include injuries resulting from types of torts such as the "false light" claim. Additionally, a letter from defendant to the plaintiff in October, 2001 served as a notification that Harleysville had a right to withdraw its defense of the suit if they (Harleysville) determined that there was no duty to defend.

The plaintiff and its employee reached a settlement to which the insurer contributed \$25,000. However, the defendant refused to pay most of the insured's legal fees on the basis that the employee's claims were not actually covered due to the employment practices exclusion. Plaintiff then filed suit against defendant and moved for partial summary judgment on the liability of Harleysville for the fees incurred in defense of the suit brought by its employee.

The U.S. District Court for the District of Maryland determined that the issue before them was whether the defendant was entitled to withdraw its agreement to pay the fees. The court ruled that the insurer, having undertaken to provide a defense and having failed to expressly reserve its right to seek reimbursement of fees, could not withdraw its agreement to pay the fees. Under Maryland law, the duty to defend was separate from the duty to indemnify. The duty to defend existed when there was a potentiality that a claim *could* be covered by the policy. This rule, known as the "potentiality rule," does not make the duty to defend contingent on the duty to indemnify. If the insurer had determined while the suit was pending that it had no duty to indemnify, it could have sought a declaratory judgment

that it no longer had a duty to defend. However, the defendant did not do that in this case and, therefore, had an obligation to pay the legal costs of the plaintiff's other suit. The court thus granted the plaintiff's motion for partial summary judgment.

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SAUNDERS and SCHMIELER, P.C.
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