

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

Insurance Liability -- *Gallegos v. Allstate* -- 2003 WL 293205

(February 12, 2003.)

A young child under the supervision of a day-care provider was left locked in a hot car and died from injuries resulting from a heat stroke. Allstate agreed to provide minimal coverage for the death under the automobile policy issued to its insured day care provider. However, they argued that coverage under the insured's renter's policy, which had a day care endorsement, was excluded because the death occurred in the insured's vehicle. The Court of Appeals held that when the legislature passed Md. Code Ann., Ins. §§ 19-202, requiring homeowner's insurers to offer day care coverage, it decided to shift the requirement to offer coverage for off-site injuries resulting from the use of a motor vehicle from homeowner's policies to motor vehicle policies. It, therefore, did not intend to preclude homeowner's insurers from including motor vehicle exclusions in day care endorsements in homeowner's policies. The primary purpose of §§ 19-202 was to overcome the traditional exclusion in homeowner's policies for businesses operated in the home, as it applied to day care businesses. Whether this exclusion in the insured's renter's policy was effective did not depend on whether coverage was available under the insured's motor vehicle policy.

Real Property: Implied Reservation of Easement to Access Minerals-- *Calvert Joint Venture #140 v. Snider* -- 2003 WL 301326 (February 13, 2003.)

Plaintiff, a land purchaser brought action against sellers seeking a declaratory judgment after they refused to sign a subdivision plat subordinating their mineral rights to surface rights. Plaintiff also sought reformation and specific performance. The Circuit Court, Montgomery County entered judgment in favor of vendors.

On appeal, the court held that the grantors could not use the property's surface to prospect for or extract any subsurface minerals, oil, or gas, for two combined factors: (1) any implied reservation as to access to the surface of the property for mining would be an unreasonable way to access the minerals when the grantors were aware, when the agreement was made, of the grantee's planned use as a residential subdivision, and the use of the surface to conduct mining operations was incompatible with such residential use; and (2) an implied reservation to use the surface of the property was unnecessary when the agreement was made, as the grantors' rights to extract the reserved oil, gas or other minerals could be accessed through the grantors' adjacent property that they were in possession of at the time of the agreement. Alternatively, the grantors failed to meet their burden of proof with regard to the elements of establishing an implied reservation. Pursuant to well-established law, the grantors' reservation of all oil, gas and other mineral rights was a reservation of a perpetual (not life) interest. The grantors owed a duty to support the property's surface.

Torts--Duty of Common Carrier Toward Passengers --*Todd v. Mass Transit Administration* --2003 WL 329194 (February 14, 2003.)

While a passenger was riding an MTA bus, a group of juveniles boarded and began harassing the other passengers on the bus. As they neared the passenger, one of them struck him in the head and when he said something, they all jumped on him and attacked him. The attack ended when the bus driver pulled over and allowed the juveniles to flee as the driver pressed the panic button, in line with company procedure. The passenger alleged a breach of the duty of care and failure to come to his assistance or to assure his safety. The trial court granted summary judgment for the defendant.

On appeal, the Court of Appeals reversed, holding that once the bus driver became aware of the attack, he had a duty to take steps to protect the passenger from further attack. The court found that the passenger had presented sufficient evidence to raise a factual issue as to whether the company, through its driver, knew or should have known that the attack was imminent, and if such knowledge was in enough time to have prevented or mitigated the injuries. The court discussed the bus company's duty of care to its passengers in detail before arriving at this determination.

MARYLAND COURT OF SPECIAL APPEALS

Private Causes of Action, Unsolicited Faxed Advertisements -- *R.A. Ponte Architects Ltd. v. Investor's Alert Inc* -- 2003 WL 201273 (January 29, 2003.)

Plaintiff sued Defendant under a Federal statute that prohibited unsolicited faxes. The Telephone Consumer Protection Act granted state courts jurisdiction over private causes of action arising out of the sending of unsolicited faxes, but the plain language of the provision allowed this to happen only if such an action was permitted by state law. Md. Code Ann., Com. Law §§ 14-1313 (2000) had provided for many years that the state attorney general was the appropriate party to proceed against senders of unwanted faxes, even though another section of the same statute explicitly provided a private cause of action for recipients of unwanted telephone calls.

The Court of Special Appeals affirmed the decision of the trial court. By setting up this statutory scheme, Maryland's legislature had made it completely clear that it did not accept the offer of jurisdiction over private actions set forth in the federal law, so the consumers could not proceed on their

own against the advertisers. Subsequently, only the attorney general could enforce the Maryland statute.

Damages and Admissibility of Testimony Regarding Negligent Party's Illness -- *Hodge v. Babel* --

2003 WL 193750 (January 30, 2003.)

Both parties were involved in an automobile accident and the plaintiff, an injured woman, sought treatment at a hospital. She was released that evening and later obtained treatment for her claimed injuries. The driver conceded that his negligence caused the accident, making the award of damages the sole question before the court. During trial, the driver was permitted to testify that he was unemployed and had been diagnosed with multiple sclerosis (MS) since the accident. The jury returned a verdict for the woman in an amount that was less than her claimed damages, and on appeal the court affirmed.

The Court of Special Appeals held that the trial court did not abuse its discretion in permitting the driver to testify that he had MS. The driver's appearance was unsteady and he used a cane at trial, making it obvious to the jury that he was suffering from some serious ailment. The brief explanation of the driver's illness was permissible where, if none had been given, the jury might have thought that the disability caused the woman's injuries. The trial court instructed the jury not to let sympathy for either party play a role in their verdict and the presumption that the jury followed the instruction was not rebutted.

HMO's-- *Mercy Medical Center v. United Healthcare* -- 2003 WL 193734 (January 30, 2003.)

The hospital set up a physician network, or individual practice association (IPA). To ease conclusion of an administrative service provider contract between the HMO and the IPA, the hospital eventually executed a guarantee agreement under which it promised to pay certain amounts to the HMO, to cover outlays to third-party providers, in the event the IPA failed to do so. The IPA went bankrupt and the HMO sued the hospital.

The appellate court held that although the underlying IPA agreement had been terminated and replaced, that had no effect on the hospital's obligation to cover the amounts the IPA would have been expected to pay the HMO. This was because its guarantee was a contract completely independent of the underlying agreement, unlike a contract of suretyship which, under Maryland law, would have been dependent on the underlying agreement. The obligation to pay was not subject to any condition precedent. Since the HMO failed to ask within 30 days that the judgment be amended to include an award of prejudgment interest, it could obtain relief only if it could show fraud, jurisdictional mistake, or irregularity (which usually referred to deficiencies in notice), which it could not.

Civil Procedure--Award and Reduction of Punitive Damages

-- *Darcars Motors of Silver Spring v. Borzym* -- 2003 WL 193744 (January 30, 2003.)

The plaintiff car buyer purchased a car from the defendant car dealer. The car dealer repossessed the car because he was not satisfied with the buyer's representations regarding insurance on the car. The dealer did not return the cash down payment on the car to the plaintiff. The defendant also failed to return a laptop computer and the plaintiff's CD collection that were left in the car. The Circuit Court, Montgomery County entered judgment on a jury verdict in favor of the plaintiff awarding him \$4,300 in compensatory damages, but reduced the jury's punitive damages award from \$100,000 to \$25,000.

On appeal, the court found that the evidence was legally sufficient to permit the jury to infer that the conversion was motivated by actual malice, and the award of punitive damages was not improper. The

court also held that the car buyer adequately made a specific demand for punitive damages and sufficiently alleged facts that would support a claim of actual malice in the conversion. Additionally, the trial court did not abuse its discretion in reducing the punitive damages award.

Venue--Employee Discrimination

--*Pope-Payton v. Realty Management Services* -- 2003 WL 202600 (January 31, 2003.)

A woman brought an action against her employer, alleging they were not accommodating her multiple sclerosis when they assigned her to new work locations. She subsequently felt she had to quit rather than attempt to commute and claimed the employer's actions were discriminatory. The Circuit Court for Prince George's County ruled that Montgomery County was the appropriate venue for the action.

Although some previous courts looked to where the discriminatory decisions were made, other factors, including where the effect of the actual discrimination was felt, were also relevant in determining venue in a discrimination case. In the circumstances of this particular case, almost everything related to the action occurred in Prince George's County. Therefore it was under this county's ordinance that the employee filed her suit. The Court of Special Appeals subsequently reversed the decision of the lower court and remanded the action for trial in Prince George's County.

Venue--Medical Malpractice -- *Cobrand v. Adventist Healthcare* -- 2003 WL 245110

(February 5, 2003.)

Parents sued a hospital for medical malpractice, alleging negligent post-natal treatment of their child. The hospital had sites for health care delivery in various Maryland counties. The main site where the plaintiff's child was injured was located in Montgomery County. However, the parents and child were living in Prince George's County, which is where they filed their complaint. But due to the fact that most of the witnesses lived in Montgomery County, the hospital sought to transfer venue from Prince George's County to Montgomery County for the convenience of all the parties involved with the case.

The appellate court affirmed the decision of the lower court in granting Defendants motion to transfer venue. The court found that the lower court did not abuse its discretion based on Maryland Rule 2-327(c). While it is the plaintiffs right to choose a preferred forum where they want to bring their suit, it is also within the rights of the defendant to request a change in venue in order to balance the convenience of all parties and witnesses with the interests of justice. The Court of Special Appeals ruled that they would not question the findings of the lower court when it was evident that the judge used the appropriate balancing test and applicable legal principles in making his decision to grant the defendant's motion.

Public Official Immunity --

Farrell v. Theurer -- 2003 WL 245093 (February 5, 2003.)

Local police officials recruited volunteers for a program that helped train officers in dealing with alcohol-related situations. The program involved consuming alcohol while having blood-alcohol level monitored and partaking in various sobriety tests. A lieutenant in the volunteer fire department agreed to participate, and signed an informed consent form in which he promised not to drive for at least 12 hours after participation. Upon completion of the program one evening, the lieutenant returned home safely. Once there, he continued drinking then left on his motorcycle at an excessive rate of speed. He was killed that night after suffering fatal injuries in an accident.

The deceased's survivors sued the police officials, arguing that they had been performing a ministerial rather than a discretionary function in running the training exercise. After determining that it could hear an interlocutory appeal of an order denying the officials' motion for summary judgment on the basis of immunity, the appellate court held that the conduct of training exercises generally required an exercise of discretion on the part of their supervisors, so the officials were protected by the official immunity provision of Maryland law.

Damages -- *Brooks v. Bienkowski*

-- 2003 WL 245364 (February 5, 2003.)

Surviving husband brought personal injury, survivorship, and wrongful death actions against a motorist after his wife, a pedestrian, was struck and killed. The Circuit Court entered judgment on a jury verdict for the surviving spouse that awarded him \$26,744.47 in total damages. They also denied the spouse's motion for a new trial as to damages only.

The plaintiff asserted that the appellate court's review should be restricted to the record before the in banc court. The appellate court held the appeal from the in banc court's judgment was subject to Md. Rule 8-411 and 8-413(a), mandating the filing of the entire transcript of the proceedings before the trial court. In light of this requirement, it was implicit that the appellate court would utilize that record since the court had to consider the entire trial record in reviewing the in banc court's judgment.

The Court of Special Appeals ruled that the jury's failure to award the injured party non-economic damages, despite finding in his favor on the issue of liability, did not necessarily warrant a new trial. The plaintiff's assertion that the tortfeasor did not dispute that his alleged loss of household services, due to the death of his spouse in the underlying accident, was not supported by the record. There was no evidence as to the number of hours the decedent performed household services. If the jury's verdict was a compromised verdict, that did not require a new trial. Furthermore, the trial court's denial of a new trial as to damages was not an abuse of discretion.

Insurance Rates -- *Insurance Commissioner v. Carefirst* -- 2003 WL 261936 (February 10, 2003.)

A proposed increase in the insurers' rates were disapproved by the Maryland Insurance Administration. The decision was affirmed by the Insurance Commissioner, who held that the rates were excessive upon consideration of the "SAAC" differential (Substantial, Available and Affordable Coverage.) The insurers sought review on three theories. They contended that the commissioner exceeded his authority 1) by venturing outside strict actuarial concerns in disapproving their proposed rates, 2) in treating a particular offer for open enrollment insurance as income, and 3) in his method in setting new rates. The trial court reversed the commissioner's decision as being in excess of his authority.

However, the Court of Special Appeals reversed, and reinstated the commissioner's original determination. The court held that the commissioner had acted within the scope of his authority pursuant to Md. Code Ann., Ins. §§ 14-126, and that he properly considered policy and other relevant considerations which were not just confined to statistical and actuarial data. The doctrine of "ejusdem generis" did not preclude such considerations and alternatively, the SAAC differential was deemed statistical and actuarial, and was properly treated as an indirect subsidy. Therefore, the insurers did not meet their burden of showing that the methodology employed was improper.

Medical Malpractice -- *Eid v. Duke* -- 2003 WL 302326 (February 13, 2003.)

An employee, along with his wife, filed a medical malpractice action against the administrator of his employer's disability benefits plan and the administrator's medical consultant, alleging that the

defendants negligently caused the employee to return to work before he was physically fit to do so by cutting off his short term disability benefits under the employer's ERISA (Employee Retirement Income Security Act) covered employee benefit plan. The trial court entered summary judgment for defendants, finding that plaintiffs' tort claims were preempted by ERISA. The plaintiffs appealed.

The Court of Special Appeals affirmed. The court held that the ERISA preemption issue could not be determined independently from the malpractice claim. The court also held that the plaintiffs' state law tort action "related to" a benefits determination under an ERISA covered plan and was, therefore, preempted under ERISA.

Sixth Amendment Protection -- *Carter v. State* -- 2003 WL 470561 (February 26, 2003.)

When defendant was transferred from a central booking jail cell to the regular jail, officers found two documents that defendant had prepared at his lawyer's request. Both documents were admitted in evidence at his murder trial. The appellate court held that not only were both documents protected by attorney-client and work product privileges, but they were also constitutionally protected. Although once he was in a cell defendant had no reasonable expectation of privacy pursuant to the Fourth Amendment, the seizure violated his right to counsel guaranteed by the Sixth Amendment. The evidence in question was too prejudicial for its erroneous admission to have been harmless error and, therefore, a new trial was required.

Employment--Disability Discrimination--*Cohen v. Montgomery County Department of Health and Human Services* -- 2003 WL 548853 (February 27, 2003.)

Plaintiff was an employee of Montgomery County Department of Health and Human Services for over 20 years. In 1995, she was diagnosed with multiple sclerosis, yet waited until 1998 to inform the employer of her condition. At that time, her diminished strength began to affect her ability to sufficiently carry out the responsibilities of her job. Plaintiff then requested an accommodation from the defendant based on her disability, which was not granted until 17 months later. The trial court granted the defendant's motion to dismiss for failure to state a claim since the accommodation was eventually granted, albeit a lot later than was requested. Plaintiff appealed under the theory that such an unreasonable delay was disability discrimination.

The Court of Special Appeals reversed and remanded the decision of the lower court. The court held that the plaintiff's action had met all the requirements in the American Disabilities Act and, specifically, that the employer had notice of the disability and failed to provide the accommodation requested. Since timeliness was a factor in determining the reasonableness of an accommodation, plaintiff had sufficiently stated a cause of action for discrimination against her disability since it took defendants 17 months to grant the accommodation.

Worker's Compensation in Occupational Deafness Case -- *Tru-Rol Company v. Yox* -- 2003 WL 660945 (March 3, 2003.)

Employee filed a Worker's Compensation claim against his employer alleging that he suffered significant hearing loss as a result of his job over the previous 47.5 years. The committee reviewing the claim determined that it was barred by the statute of limitations. On appeal, the Circuit Court for Baltimore County reversed and remanded the decision of the committee. The Court of Special Appeals examined whether or not the statute of limitations could run in an occupational deafness case when the claimant was not disabled as defined by the statute.

The court reversed the decision of the Circuit Court and agreed with the committee that the statute of limitations had run by the time the plaintiff filed his claim. While the statute requires that an employee

must have the inability to work in order to recover for occupational diseases, the court recognized that the legislature likely intended to allow compensation for employees who were inflicted with a disability in general. Additionally, the statute of limitations begins to run when the employee becomes aware (either directly or via inquiry notice) that the disability arose from working conditions. In this case, the employee had actual awareness that his disability was related to his employment nearly 3 years before he filed his claim. Therefore, the statute of limitations had already run.

[U.S. DISTRICT COURT FOR THE DISTRICT OF MARYLAND](#)
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SAUNDERS and SCHMIELER, P.C.
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