

# Recent Developments in the Law

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Real Estate, Jury Instruction, and Civil Procedure

**Gross Negligence:** In District of Columbia v. Henderson, et al., filed on April 30, 1998, the District of Columbia Court of Appeals reversed a trial court judgment and held that the conduct of a police officer traveling through an intersection at ten miles over the speed limit with his emergency lights on, sirens blaring, and headlights on, did not constitute gross negligence when he collided with a civilian vehicle. The appellate court defined gross negligence in accordance with District of Columbia v. Walker, 689 A.2d 40. This definition provided that conduct must be an extreme deviation from the ordinary standard of care that implies a sort of bad faith or shows a disregard of potential risk of injury. In the case at hand, the police officer was not driving with extreme deviation or reckless disregard for the safety of others. Gross negligence can be distinguished from simple negligence by a demonstration of aggravating factors which was not present during this incident. The D.C. Court of Appeals held that the police officer in question did not meet the standard that Walker set for gross negligence. The ruling of the trial court in favor of the civilian was reversed.

**Insurance:** In Gloria Pettit v. Erie Insurance Exchange, filed on May 21, 1998, the Maryland Court of Appeals held that a homeowner's insurance policy did not require the insurance company to defend the actions of a pedophile when a suit was brought against him. James Kowalski sexually abused two young boys for a period of two years. A psychiatrist stated that Mr. Kowalski had a disorder and did not intend to harm the boys. The court held that as a matter of law, when an adult sexually molests a child the behavior is classified as intentional. Mr. Kowalski's homeowner's policy included an exclusion for "injury or damage expected or intended". When the mother of the two boys filed suit, the Defendant demanded that the insurance company defend him. Erie filed for declaratory judgment claiming the law suit was within the realm of the above exclusion. The trial court granted the judgment and the appellate court affirmed.

**Estates:** In Kimberly Ann Gerguson et al. v. Steven J. Cramer et al., filed on May 21, 1998, the Maryland Court of Appeals ruled that a third party beneficiary to a will could not file suit against the lawyer representing the estate. In three similar cases, third party beneficiaries filed malpractice/negligence claims against their parents' lawyers. The Court of Appeals ruled that there was no attorney-client relationship in existence for the third party. The beneficiaries had the option of suing the personal representative (most often a parent) who can in turn sue their attorney. The appellate court upheld the lower court's decision.

**Workers' Compensation:** In Porter v. Bayliner Marine Corporation, filed on May 18, 1998, the Maryland Court of Appeals held that a workmans' compensation claim may be re-opened after the five year period if the compensation was given in the fashion of a lump sum and was unapproved as such a disbursement from the Workers' Compensation Commission. Arthur Porter injured himself while on the job at Bayliner Marine Corporation.

The Workers' Compensation Commission awarded Porter permanent partial disability for 55 weeks due to his injury. The company paid Porter in one lump sum. More than five years after this award, but less than five years from the estimated last weekly disbursement, Porter wanted to reopen his claim. Bayliner argued that the statute of limitations barred the reopening of the claim. The commission, as well as the Circuit Court granted summary judgment in favor of Bayliner. The Court of Appeals granted certiorari and agreed with Porter that the statute in LE § 9-736 required any lump-sum payment to be approved by

the commission. Because Bayliner did not get such approval, the Court of Appeals reversed and remanded the trial courts decision.

**Civil Procedure:** In Liberty Mutual Insurance Co., et al. v. Ben Lewis Plumbing, Heating & Air Conditioning, Inc., et al., filed on May 27, 1998, the Maryland Court of Special Appeals ruled that an affirmative defense must be included in the answer to the complaint even if it is not listed as one of 21 defenses that need to be set forth separately according the Maryland Rules. Liberty Mutual Insurance Company sued Ben Lewis Plumbing Heating & Air Conditioning for back premiums on a workers' compensation policy. Liberty assured Lewis that the 1986 policy would contain the same terms as the previous two years. Liberty changed the policy in contradiction to the oral agreement, but Lewis did not notice the change until several years had passed. In the trial court, a jury found that Liberty negligently misrepresented the terms of the policy. However, the appellate court stated that negligent misrepresentation was not a valid issue for the jury because the defense was raised in a Motion for Summary Judgment that was filed after the initial Answer to the Complaint. The judge wrote "Rule 2-323 (a) means exactly what it says: 'Every defense of law or fact to a claim for relief ... shall be asserted in an answer ...,'". In Scott v. Jenkins, the Court of Appeals found that a defense must be asserted with enough detail so that the opposing party is aware of the basis of the claim and the relief demanded. The judge clarified the ruling stating that an affirmative defense may be presented in a Motion for Summary Judgment if the motion is the first response of the Defendant to the Complaint. The appellate court went one step further and stated that evidence of oral agreements could not be presented by Plaintiff Lewis due to the changes in the policy being clear and unambiguous and the fact that their business was sophisticated enough to have the responsibility of reading the terms of the policy. The final ruling of the court stated that under the Maryland Rules of Civil Procedure any affirmative defense must be stated in the Answer to the Complaint if this is the first pleading filed on behalf of the Defendant.

**Insurance:** In The Guardian Life Ins. Co. Of America v. United States Tower Services, Ltd., filed on May 28, 1998, the Maryland Court of Special Appeals ruled that one can waive their right to a premium refund of an insurance policy through the action of continuing to pay insurance premiums after demanding the initial refund and then requesting to re-instate the policy after it lapsed for non-payment. United States Tower Services purchased life insurance for some of their employees through The Guardian Life Insurance Company of America. Within ten days receipt of the policies, United States Tower Services demanded a full refund of the premiums paid for the employee policies. The Guardian Life Insurance Company refused to refund the premiums. United States Tower continued to make premium payments as well as re-instating these same policies when they had lapsed. United States Tower decided to sue Guardian to enforce their right to a refund after a history of making regular payments. The trial court found in favor of United States Tower. However, the Court of Special Appeals reversed their decision stating that a party cannot demand rescission of a contract while at the same time treat the contract as valid. The appellate court found that through the history of regular payments, United States Tower waived their right to a refund.

**Punitive Damages:** In Bowden v. Caldor, Inc., et al., filed on June 2, 1998, the Maryland Court of Appeals held that a judge may reduce an excessively high punitive damage reward without ordering a new trial to determine a new punitive damage figure. Samuel Bowden was a sixteen-year-old African American male hired to work as a customer service representative at Caldor, Inc. He was accused of stealing from the store. The store security detained him for over four hours in a windowless room. He was prevented from leaving or using the telephone until he signed a statement taking responsibility for the theft. He returned the next day with his mother. The security officers made racial remarks and then paraded Mr. Bowden around the store in handcuffs until the police arrived. The charges against Mr. Bowden were thrown out due to insufficient evidence. In his suit against Caldor, the jury awarded him \$110,000 in compensatory damages and \$350,000 in punitive damages. The judge granted JNOV on the two counts which reduced the compensatory damages to \$60,000. The Court of Appeals threw out the

punitive damage award and remanded a new trial. The new jury awarded Mr. Bowden \$9 million in punitive damages. The trial judge reduced the award to the original \$350,000. The Maryland Court of Appeals reversed and sent the case back for a new determination giving the judge the legal ability to reduce a punitive damage award to what is appropriate for the conduct and reasonable for the Defendant. A guideline of three times the amount of the compensatory award was suggested.

**Premises Liability:** In Cottingham v. Housing Authority of Baltimore City, filed on June 2, 1998, the Maryland Court of Special Appeals decided a signed inspection sheet from a tenant can not adequately serve in itself as grounds for dismissal of a lead-paint claim. Delores James signed an inspection sheet at the time that she moved into her home that noted there was not a problem with chipping or flaking paint. Her grandson, Bryron Cottingham, lived with her the first four years of his life and was diagnosed with high lead levels in his blood. A suit was filed claiming negligence and protection under the Consumer Protection Act. During Mrs. James' deposition, she stated that the paint in her home was flaking and peeling when she moved in. The Housing Authority of Baltimore moved for a Summary Judgment on the Consumer Protection Act claim and the negligence claim based on the signed inspection sheet. The Court of Special Appeals held that the issue of flaking paint was a dispute of a material fact; therefore, Summary Judgment should not have been granted concerning the Consumer Protection Act claim. They continued to state that the Plaintiff failed to show the landlord's knowledge of deteriorated lead paint and affirmed the Summary Judgment granted on the negligence claim.

**Motor torts:** In Teufel v. O'Dell, filed on June 2, 1998, the Maryland Court of Special Appeals ruled that a contributory negligence claim was not applicable for a sudden stop situation where one car rear-ended another car making a legal right hand turn on a red light. Eric O'Dell rear-ended Ronald Teufel at an intersection where both men were making legal right on red turns. Teufel sued O'Dell for negligence. O'Dell claimed that Teufel stopped suddenly after beginning to make his turn. He continued to state that this action constituted contributory negligence. In Maryland, if a Plaintiff has contributed to the negligent act in which the claim arose, the Plaintiff can not recover any awards. Contributory negligence would bar Teufel from recovery. The court wrote that a right turn at a red light is a tentative and hesitive maneuver that frequently mandates starts and stops. The sudden stop defense applies only to situations where a decrease in speed or a turn can not be anticipated. The court's decision entitled Teufel to recovery.

**Indemnity:** In Franklin v. Morrison, filed on June 11, 1998, the Court of Appeals for the State of Maryland held that a joint tortfeasor was not entitled to indemnity from another tortfeasor on the grounds that he was actively negligent in the claim. Michael Franklin had his Blazer maintained at Jiffy Lube on December 24, 1992. It was found that someone failed to replace or improperly replaced the rear differential check plug. Fluid escaped in a slow asymptomatic manner. On January 16, 1993, the Blazer ran out of fluid while Mr. Franklin was in the middle lane of Route 50. He claimed that the Blazer came to a stop within four-tenths of a mile. Behind him, Mrs. Morrison and her two children were riding in a 1990 Dodge Minivan. She was unable to stop or swerve her vehicle to avoid the Blazer. A tractor-trailer from National Carriers plowed into the minivan. Mrs. Morrison and her two children died in the course of the accident. Glenn Morrison, the husband and father, sued Jiffy Lube, National Carriers, and Michael Franklin. Both Jiffy Lube and National Carriers settled the claim with Mr. Morrison before the time of the trial. The jury concluded that Mr. Franklin was actively negligent by not moving his vehicle from the lanes of traffic or putting on his hazard lights. Mr. Morrison was officially awarded \$6.8 million dollars in damages. Mr. Franklin made a claim to have National Carrier indemnify or pay him for their portion of the damages. Because the trial court found that National Carriers was not a liable party, the amount they settled for with Mr. Morrison could not be deducted from the total amount awarded in damages. The court continued to say that Franklin would be held responsible for the \$6.8 million dollar reward with the settlement of Jiffy Lube subtracted. Mr. Franklin's plea for indemnity was denied.

**Real Estate:** In Marcia S. Lopata, et vir. v. Eugene Miller, et al., filed on June 24, 1998, the Maryland

Court of Special Appeals affirmed the lower court ruling that held real estate agents were not strictly liable to a buyer for unknowingly passing on incorrect information concerning the premises that was provided to them by the seller. Eugene and Mildred Miller sold the Lopatas a home in Anne Arundel County. The Millers told the Lopatas that the home was located on three acres of property. Some years later, the Lopatas found their home to have included less than two acres of property. They confronted the Millers who explained that they did not know of the discrepancy and were under no obligation to verify every fact presented by the seller of the property. The Court held that because the real estate agents represented the seller and not the buyer that they were not obligated to the buyer. The Court also refused to hold the Millers strictly liable for the Lopatas damages that they claimed to have incurred as a result of the misrepresentation.

**Workers Compensation/ Wrongful Death:** In Powell v. Erb, filed on May 22, 1998, the Maryland Court of Appeals decided that Maryland law applied to a case where Maryland residents had an accident while in Pennsylvania on business. On March 18, 1994, a K&L Microwave employee was to pilot a company plane from Pennsylvania back to his home town of Salisbury, Maryland. Two K&L employees were traveling with him. The plane crashed and the pilot and one of the passengers died. The second passenger survived the crash, but was seriously injured. Both the family of the deceased passenger and the surviving K&L employee sued the company, the parent corporation of the company, and the deceased pilot's estate. The question became whether Maryland or Pennsylvania law was to govern the suit. Maryland workers compensation law allows an employee to file a negligence suit against a fellow employee; Pennsylvania law does not. The Court of Appeals called upon the analysis in Hauch v. Conner which was faced with a personal injury suit between two employees in the same company where the jurisdiction could have been either Maryland or Delaware. In Hauch, the court found that the state with the greater interest held the applicable law on the issue. In the case hand, the employees all resided in Maryland with their principle place of business being in Maryland. The Court ruled that Maryland workers compensation law was the choice of law to be used concerning the suit which consequently did not allow a suit against the pilot's estate.

**Emotional Distress:** In Hunt v. Mercy Medical Center, filed on May 29, 1998, the Maryland Court of Special Appeals held that emotional distress, if capable of having an objective determination able to quantify the injury, was compensable under the physical injury rule. Negligence law stated that any physical injury is compensable if the injury is capable of objective determination Belcher v. T. Rowe Price Found., Inc. 329 Md. 709. Emotional injury can be classified as a physical injury if there are outward manifestations that can be detailed enough to give a jury a basis for quantifying the injury. Mr. Dell'uomo was diagnosed with prostate cancer from Dr. Fazekas at Mercy Medical Center. After 15 treatments of radiation, it was found that Mr. Dell'uomo was misdiagnosed. He suffered from constipation, sleeplessness, fatigue, and mood changes. The court found that Dell'uomo's form of anxiety was enough physical manifestation to give the court an objective determination of his emotional distress. Therefore, Mr. Dell'uomo's emotional distress was categorized as a physical injury by the court and was thus compensable. Further, the court determined that expert testimony was not needed to prove causation in this case seeing that any juror could competently decide if the misdiagnosis was the cause of the symptoms of injury.

**Jury Instruction:** In Rogers v. Ingersoll-Rand Company, filed on May 29, 1998, the U.S. Court of Appeals for the D.C. Circuit examined the District Court's jury instructions and evidentiary rulings and found no reversible error in their decisions. On April 17, 1992, milling machine model MT-6520 manufactured by the Ingersoll-Rand Company was being used by some workers repaving a road in the District of Columbia. Cosandra Rogers was directing traffic to ensure the safety of her co-workers. Ms. Rogers had her back to the milling machine, and the machine's operator accidentally backed the machine onto Ms. Rogers. The back-up alarm on the machine did not go off to signal the movement. Ms. Rogers suffered severe internal injuries as well as having her left leg amputated without hope of being able to

use a prosthesis. She filed suit against Ingersoll-Rand claiming strict liability in the defective design and manufacture of the MT-6520. The jury of the District Court found for Ms. Rogers and awarded her \$10.2 million in compensatory damages as well as \$6.5 million in punitive damages. The Defendant wanted the jury to be presented with the instruction "to find for the defendant [if]...the milling machine was accompanied by adequate warning which made the milling machine safe for use if the warnings are followed". The court found this instruction to be a misstatement of D.C. law which allows warnings to reduce the danger of the product, but not to eliminate danger. A warning was not the only consideration to be given when determining if a product was defectively designed. In essence the Defendant was claiming that adequate warnings succeed all factors including magnitude of danger. This was simply a mis-interpretation of the law. Although, the Defendant may have filed for a less stringent instruction, they did not pursue this avenue and the Court does not take the responsibility in amending the positions of the parties to make them applicable to the law. Ingersoll-Rand also disputed the fact that the District Court allowed evidence to be presented of a previous injury with the same model machine without the Defendant's ability to introduce additional information about the accident. The Plaintiff presented evidence of a previous injury to support the notion that the Defendant was "on notice" of design defects in the MT-6520. The Defendant wanted to present evidence that the injured party's careless actions and not a defect caused the accident. The appellate court determined that if in fact the District Court made an error in not permitting the Defendant to present his argument, an error of this degree was considered harmless. The manufacturer was placed on notice of its product having dangerous potential whether or not fault lie in the product or the user. The jury in the previous incident recommended several types of safety measures to be added to the MT-6520, none of which were implemented. Beyond this, the issue at hand in the Rogers accident was a defect in the machine. The higher court determined that because the issue of defect and notice of design defect were separate and distinct, the lower court did not err in refusing to allow the Defendant to expound on the introduced testimony. The United States Court of Appeals for the District of Columbia Circuit affirmed the judgment of the District Court in every regard.

**Civil Procedure:** In Nelson v. Kenny, filed on May 27, 1998, the Maryland Court of Special Appeals remanded a case back to the trial court after the Defendant filed an interlocutory appeal. Ramona Kenny was a teacher at a middle school who attempted to break up a fight between two students. In the process, she was assaulted by a student. The police were called, and Officer Nelson responded. Officer Nelson arrested both the student and Ms. Kenny, the teacher. Ms. Kenny subsequently sued the officer for false arrest, false imprisonment, loss of consortium, and a violation of her rights according to Article 24 of the Maryland Declaration of Rights. The Defendant filed a Motion for Summary Judgment based on the grounds of public official immunity. The court denied this motion. After the denial, Officer Nelson filed an interlocutory appeal with the appellate court. An interlocutory appeal is an appeal that questions a procedural matter that must be decided for the case to be decided, but is not actually an issue determinative of the case. The appellate court stated that public official immunity is not an absolute immunity. Instead, it is a qualified immunity. The qualified immunity defense may be defeated with proof of malice or ill will. The Court of Special Appeals stated that a reasonable jury could resolve the dispute as to the Defendant's intentions in the occurrence in question whether they be honest or done in malice. Due to the fact that a jury could draw this conclusion, the case was remanded back to the trial court.

**Contracts:** In Intelus Corp. v. Bernard H. Barton and MedPlus Inc., filed on June 3, 1998, the United States District Court upheld an employer's "no compete" contract even though a specified region was not given. Mr. Bernard Barton worked for Intelus Corporation where he signed a contract that stated he may not "engage in any business" that would compete with Intelus Corporation for a specified period of time. Maryland case law supports contract agreements that do not allow employees to compete when both a specified duration for the covenant is stated and a geographical restriction is given that reasonably protects the employer's business. Mr. Barton's contract, however, did not specify a geographical restriction. His argument was that he moved from a Maryland corporation to a corporation in Cincinnati,

and although both companies were involved in the same activity, he did not take any clients from the Maryland corporation with his move. Instead, he only used the customers that the Cincinnati company had already claimed as established. However, the court ruled that with the modern uses of computers and modems that companies can solicit customers any where in the world. The court stated that the "no compete" contracts must not restrict fair competition or former employees from being able to earn a living. With all this said, the court agreed with Intelus and ruled to enforce the contract signed by Mr. Barton. Mr. Barton was therefore barred from working for the Cincinnati company or any other competitor until six months from his date of resignation with Intelus. The Court's decision was an important opening for technologically advanced companies throughout the nation.

**Punitive Damages:** In Kolstad v. American Dental Association, filed on May 8, 1998, the United States Court of Appeals for the District of Columbia Circuit held that the standard for punitive damages under Title VII of the 1964 Civil Rights Act was higher than the standard for liability and can be enforced only with a display of egregious conduct. Carole Kolstad claimed that her employer, the American Dental Association (ADA), intentionally discriminated against her as a female by appointing a male in the position which she was denied. The District Court refused to instruct the jury as to punitive damages during her initial suit. The jury found for Ms. Kolstad and awarded her back pay. The appellate court reviewed the standard of evidence for a punitive damage award under Title VII. They found that when Congress wrote the statute, they were attempting to enact a two tier system that would award compensatory damages for discriminatory claims and for those claims that engaged in egregious conduct, exceeding intentional discrimination, punitive damages would be awarded. In the case at hand, the appellate court rejected the Plaintiff's assertion that a finding of intentional discrimination in itself was enough evidence to present a question of punitive damages to a jury. The U.S. Court of Appeals for D.C. found no supporting evidence that Congress had intended to make punitive damages available on the same legal bases as compensatory damages in these types of discriminatory actions. Ms. Kolstad did not present any evidence of egregious conduct on the part of ADA. The court noted that evidence of egregious conduct can be either in the form of direct or circumstantial evidence. However, the court did not think that the Defendant's statements in the case at hand were enough to form a basis for punitive damages. Since Congress had intended for punitive damages to be used in only the worst of cases, the judgment of the District Court that did not instruct the jury as to punitive damages was affirmed.

**Forum Non Conveniens:** In Pippin, et al. v. Potomac Electric Power Co., filed on May 18, 1998, the District of Columbia Superior Court granted the Defendant's Motion to Dismiss on the grounds of forum non conveniens, and ordered that the Plaintiffs should commence their action in the Maryland court system. On March 13, 1996, Mr. Green, a resident of Maryland, hit an electric pole in Woodfeild Road industrial park in Maryland. The pole fell on the cab of his car, and he died at the scene. Lorena Pippin, as Guardian and next friend of Mr. Green's three minor children, filed suit against PEPCO for negligence in placing and maintaining the pole. PEPCO filed a motion to dismiss based on forum non conveniens which interprets "inconvenient jurisdiction". The decedent was a Maryland resident, the accident occurred in Maryland, two of the Plaintiffs were Maryland residents, the third Plaintiff was a resident of Florida, PEPCO operates in Maryland, Maryland emergency personnel responded to the accident, the coroner was located in Maryland, and the investigators were located in Maryland. The Plaintiff claimed that PEPCO's office was located in the District of Columbia, and thus, the proper jurisdiction was used. The court needed to evaluate both private and public factors before ruling on a forum non conveniens. The private factors were cited as "the ease, expedition, and expense of the trial,...including the relative ease of access to proof; availability and cost of compulsory process; the enforceability of a judgment once obtained; etc..." Public factors included administrative difficulties, imposition of a jury duty, and interpretation of another state's laws. The court decided that the private factors favored having the case tried in Maryland. After all, the witnesses, evidence, accident site, and Plaintiffs were all located in Maryland. The ultimate question regarding public factors asked if the litigation at issue had so little to do with the District of Columbia that the courts should decline to hear

the case. The appellate court found that public factors simply directed the court to dismiss the case on the grounds of forum non conveniens. With this judgment enacted, the other pending motions filed by both the Defendant and the Plaintiffs were denied as moot, and the Plaintiffs were suggested to commence an action in Maryland.

**Zoning:** In Concerned Citizens of Great Falls, Maryland v. Constellation-Potomac, L.L.C., filed on June 30, 1998, the Maryland Court of Special Appeals held that the County Board of Appeals violated its own rules and the Zoning Ordinance applicable to that county when it allowed an applicant to submit amendments to its application on the last day of zoning hearings. Constellation-Potomac filed for a special exception in Montgomery County to construct and operate an elderly care center. Over a period of nine months, eight days of hearings were conducted on the issue. Constellation-Potomac filed revisions on November 21 to their initial application. The last day of the hearings was conducted on November 25 at what time the case was closed. The Concerned Citizens of Great Falls did not have time to respond to the additions before the case was closed. On December 3, the board granted Constellation's petition. The Citizens filed a petition for judicial review, and the Circuit Court affirmed the board's decision. Upon appeal, the Maryland Court of Special Appeals vacated the board's decision and remanded the case back to the board. The appellate court claimed that by allowing the introduction of amendments on the last day of the hearing, the board committed four procedural errors: violation of the 10-day notification rule in the applicable county zoning ordinance, violation of reasonable notice rule, violation of rule 7.2.6(b) by closing the record on the day of the Defendants amendment, and closing the record without allowing the Plaintiff to respond to the Defendant's amendments. The Court determined that a sum of the four errors led to a reversible error and, therefore, vacated the Circuit Court's order of affirmation.

**Contracts:** In Noyes Air Conditioning Contractors, Inc. v. Wilson Towers LP, filed on June 29, 1998, the Maryland Court of Special Appeals held that a trial court may not alter the terms of a valid contract without evidence of some identifiable misconduct. Noyes Air Conditioning filed suit against Wilson Towers for payment concerning two contracts which they fulfilled. Noyes demanded full payment, attorneys' fees, prejudgment interest, and costs. Noyes had written in the contracts a finance charge of one and a half percent per month on any past due accounts. The trial court ruled that full payment of the original contract was to be paid by Wilson, but refused to award Noyes the other costs. The appellate court found that the payment of interest was a matter of right and that, provided the parties abide by the relevant laws, contracts should be enforced as written to maintain their integrity and entirety. Only under the terms of misconduct such as fraud misrepresentation, or overreaching may the court alter the terms of a valid contract. No such conduct was present at the case in hand; therefore, the Court of Special Appeals vacated the judgment and remanded for an award of all the Plaintiff's demanded costs.