

# Recent Developments in the Law

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**Insurance:** In *Angel Coachman, et al. v. Zurich Life Insurance Company of America*, filed on July 30, 1998, the Maryland Court of Special Appeals held upheld a 1957 Court of Appeals decision that said "a material misrepresentation made by an applicant for life insurance, in reliance on which a policy is issued to him, voids the policy, whether it be made intentionally or through mistake and in good faith." Ernest Coachman, Jr. applied for life insurance with Zurich Life Insurance Company of America approximately one year before his death. Zurich issued him a \$25,000 life insurance rider. One year later, Coachman was killed by gunshot. His parents attempted to collect the life insurance that Coachman had purchased from Zurich. However, when Coachman was filling out the application for the insurance, he stated that he had not been treated by a doctor or had any injury that needed treatment within the past five years. Zurich commenced an investigation after Coachman's death which revealed two previous gun shot wounds and a fractured jaw. Further investigation led to a criminal record that noted approximately one month before his death he was charged with intent to kill. Zurich's underwriting department felt that had Coachman disclosed his medical history on the application as requested, that the insurance would not have been issued to him. The Special Court of Appeals upheld Maryland law and affirmed the Circuit Court decision that dismissed the case.

**Landlord/Premises Liability:** In *Kimberly Shields, et al. v. Arthur Wagman et al.*, filed on August 6, 1998, the Maryland Court of Appeals held that a landlord of commercial properties can be held liable for injuries caused in a common area by the dog of one of the tenants. David Thomas had an auto repair shop in the Capitol Heights strip mall where he kept three pit bulls for security. Mr. Thomas had been on a month by month lease status with the landlord for some time. Kimberly Shields and Bernard Johnson were both attacked at separate times in the parking lot by the pit bull named "Trouble". Shields and Johnson filed a suit in the Prince George's County Circuit Court. The trial court granted the landlord's motion for judgment and upon appeal the Maryland Court of Special Appeals affirmed this ruling. However, the highest Maryland appellate court found that there was enough evidence of negligence presented at trial to defeat the motion for summary judgment. The landlord had a duty to exercise reasonable care and diligence to protect people lawfully in the common area of the parking lot. The court said that the issue was whether the dog's presence posed a threat to people in the common area. "Liability is based on control of the common area, not control of the instrumentality that caused the injury." Where an injury is sustained in a common area, the landlord had knowledge of the potentiality of the danger that caused the injury, and the landlord had the ability to rid the premises of that danger, the Court ruled that a landlord of commercial property can be held liable for injuries caused by a dog of one of the tenants.

**Torts:** In *Imperial v. Drapeau*, filed on August 27, 1998, the Maryland Court of Appeals held that absolute privilege extended to a physician who wrote a negative letter concerning the conduct of an emergency medical technician. Dr. Roland Imperial conducted a home visit and decided that emergency transport services should be used to take the patient to Sibley Hospital. Wayne Drapeau arrived and his crew determined that the patient needed to be taken to the

nearest hospital which was Suburban. Dr. Imperial did not have privileges at Suburban Hospital. Dr. Imperial wrote to his congresswoman, Constance Morella and the governor, Parris Glendening. The letters were forwarded to the Maryland Institute for Emergency Medical Services Systems and Chief of BCCRS. Both responded to Dr. Imperial's letter stating that the actions of Drapeau and the other emergency workers was appropriate. Wayne Drapeau attempted to sue Dr. Imperial for defamation. The Circuit Court granted Dr. Imperial's motion for summary judgment. Drapeau appealed, and the Maryland Court of Special Appeals reversed the lower court and ruled in favor of Drapeau. However, the Maryland Court of Appeals found that the letters written by Dr. Imperial were within the realm of absolute privilege and could not be used in a defamation action. The system urges communication to public officials to help maintain the quality of emergency services. Additionally, procedural safeguards are used protect the reputation of those individuals who are the subject of the complaint. The Special Appeals verdict was reversed, and the final judgment was in favor of Dr. Imperial.

**Work Product:** In Re: Sealed Case, filed on June 19, 1998, the U.S. Court of Appeals for the D.C. Circuit found that the District Court applied the wrong legal standard when they declared that an attorney's documents were not protected under the work product privilege because a specific claim had not yet arisen. The privilege of work product applies to written materials that attorneys prepare "in anticipation of litigation" and does not need to be in response to a specific claim. The work product privilege function is to promote effective legal services without the fear of opponents being able to obtain information. The work is privileged if there is a reasonable belief of litigation. The question before this court is whether a specific claim must have arisen at the time the attorney prepared the documents. The District of Columbia case history supports the work product privilege. The appellate court found this privilege to be an important tool for strong, satisfactory legal work. The U.S. Court of Appeals for the D.C. Circuit reversed the trial court judgment and remanded the case back to the lower court to determine if documents were prepared under the privilege of anticipation of litigation or under the unprivileged ordinary course of business. The court advised that the trial court look to see if the documents contained purely factual information or opinions and thoughts of the counsel.

**Arbitration:** In *Madison Hotel v. Hotel and Restaurant Employees, Local 25, AFL-CIO*, filed on June 2, 1998, the U.S. Court of Appeals for the D.C. Circuit reversed a judgment of the District Court that vacated an arbitration award. In 1992, the Madison Hotel laid off the bus employees and abolished the bus employee classification. The bus employee duties were reassigned to the waiters. The union representing the bus employees, Local 25, filed a complaint that proceeded into arbitration proceedings. The arbitrator assigned in the matter framed the dispute as follows: "Whether the Hotel violated the Agreement by its abolishment of the Bus Employee position, its transfer of the duties of the Bus Employees to other positions and its layoff of the Grievants in July 1992 and, if so, what is the appropriate remedy?" In the process of the arbitration, the Hotel waived its right to limit the scope of the arbitration by failing to object to the arbitrator's choosing of issues to pursue. The arbitrator decided that the Hotel must reinstate the Bus Employee classification and reinstate the employees at the status they held before termination. The Bus Employees refused to work for the Hotel again. The Hotel attempted to drop the reward and the union went back to the arbitrator who clarified that the positions must be filled by new employees. The Hotel sued to vacate the award and the case was heard in the District Court. The District Court ruled in favor of the Hotel stated that the arbitrator exceeded

his authority. However, the appellate court found that the arbitrator did not exceed the scope of his authority because there was never a formal "submission of issues" presented for arbitration. Additionally, the Hotel never objected to the arbitrator's framing of the issue. Therefore, the U.S. Court of Appeals for the D.C. Circuit reversed the District Court's judgment and ruled to enforce the arbitrator's award.

**Workers Compensation Jurisdiction:** In *Washington Hospital Center v. District of Columbia Department of Employment Services*, filed on June 11, 1998, the D.C. Court of Appeals found that they lacked jurisdiction to hear a case that was appropriately remanded by the Director of the Department of Employment Services to the Hearings & Adjudication Section of the DOES. On August 14, 1989, an employee of Washington Hospital Center was injured by a patient. WHC paid the employee temporary total disability benefits for the period of approximately two weeks. In February of 1991, the employee filed a claim for payment of temporary total disability benefits dating from the end of the initial two week period to the current date and continuing. The hearing examiner denied the claim based on the fact that the 45 day period had exceeded meaning the statute of limitations had run out and was barred by D.C. code. The Director of the Department of Employment Services reversed this decision and stated that the statute of limitations does not begin to run until the employee received the First Report of Injury as required by statutory law. The Director ordered the agency to investigate if a First Report of Injury was sent to the employee from WHC. WHC challenged the Director's decision on the grounds that he had no jurisdiction. The D.C. Court of Appeals found that the Director had proper jurisdiction. The District of Columbia's case law supports that the 45 day period specified in the applicable statute is merely directory and not mandatory. The Director remanded the case back to the Hearings & Adjudication Section for further review of potentially critical facts. Therefore, as there is no final order from the Director, the appellate court lacks jurisdiction to review the claim. The Court remanded the case back to the agency.

**Intellectual Property:** In *Tommy Larsen v. Terk Technologies Corp.*, filed on July 14, 1998, the United States District Court awarded the Danish designer, Tommy Larsen, \$217,780.00 from an American distributor for violation of the Lanham Act. The distributor disbursed an inferior product with the Danish designers name, and logo together with a "Made in Denmark" label. The American company was trying to "pass off" the inferior product as the designers, thus violation Section 43(a) of the Lanham Act. Although a design patent was not yet secured, the company did not have the right to "pass off" an inferior product as the designers.

**Survival Action:** In *Shirley Jones, personal representative of the estate of Evelyn V. Manning v. Brian T. Flood, et al.*, filed on September 1, 1998, the Maryland Court of Appeals upheld the case law of Maryland by stating that a "decendent's lost future earnings are not recoverable in a survival action in Maryland." Evelyn Manning was involved in a motor vehicle accident with Brian Flood where she was pronounced dead. Shirley Jones, the personal representative of Ms. Manning's estate filed a survival action against Flood for lost future earnings. The Circuit Court granted Mr. Flood's motion for Partial Summary Judgment concerning the lost earnings. The Court of Special Appeals affirmed, as did the Maryland Court of Appeals. Maryland law allows for collection of lost earnings in a survival action from the onset of the injury to the time of death. In the case at hand, Maryland law dictated that there were no lost earnings.

**Workers Compensation:** In *Ronnchey Lynn King v. Board of Education of Prince George's County*, filed on September 1, 1998, the Maryland Court of Special Appeals ruled that poor management did not constitute grounds for workers compensation benefits to be granted on the notion of occupational disease. Ronnchey Lynn King worked 12 hour days and conducted activities that were included in three job descriptions. She claimed that after a prolonged period of this exposure, she suffered from a nervous breakdown. After the breakdown, she suffered from several symptoms that she classified as an occupational disease including: headaches, nausea, diarrhea, cramping, balance problems, and mental confusion. She filed a claim with the workers compensation commission who rejected her claim. The Circuit Court judge who heard the appeal agreed with the commission. It was not the job that caused her symptoms, but the way management saw fit to run the job. The Court of Appeals affirmed the decision of the trial court and the commission.

**Products Liability:** In *Ruffin v. Shaw Industries, Inc.*, filed on July 16, 1998 the United States Court of Appeals found for the Defendant in a case concerning a Plaintiff who claimed physical injury due to "toxic" carpet bought from the Defendants. The Plaintiff hired a physiologist equipped with her own, personal laboratory as the expert who was to perform tests on the carpet in question. However, the Defendant proved that the Plaintiff's expert's findings could not be replicated which is a fundamental standard in the scientific method making findings acceptable in the scientific community. The Environmental Protection agency evaluated the Plaintiff's expert's studies and found the methodology used by the expert was inadequate. The Court found the Plaintiff's expert's testimony to be inadmissible pursuant to the Federal Rules of Civil Procedure and its failure to meet the standards set in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579. Without the testimony of her expert, the Plaintiff could not create a genuine issue of material fact concerning the existence of a toxic material in her carpet. The absence of a evidence showing material defect led the court to dismiss the Plaintiff's claim on all counts including those of strict liability, breach of express warranty, breach of implied warranty of merchantability, negligence, and products liability.

**Medical Malpractice:** In *Anderson v. George*, filed on September 10, 1998, the District of Columbia Court of Appeals applied the continuous treatment rule to medical malpractice suits when addressing the issue of the statute of limitations for a medical malpractice claim. Valerie Anderson underwent surgery performed by Dr. George on February 4, 1994. On February 6, 1994, she underwent emergency surgery for pain related to the surgery two days prior. She was officially discharged from the hospital on February 13, 1994. Dr. George dictated a discharge summary on March 4, 1994 which he signed on April 8, 1994. Ms. Anderson filed a complaint alleging medical malpractice on the part of Dr. George on February 13, 1997. The trial court granted Dr. George's Motion to Dismiss on the basis that the statute of limitations had already expired as Ms. Anderson's injury occurred on February 6, 1994 at the latest. Ms. Anderson appealed relying on *R.D.H. Communications, Ltd. v. Winston*, 700 A.2d 766 which adopted the continuous representation rule. The Court in *RDH* compared the attorney / client privilege to the physician / patient relationship. They reasoned that the statute of limitations must be tolled in these instances because "it would be ludicrous to expect a patient to interrupt a course of treatment by suing the delinquent doctor." Therefore, the cause of action in medical malpractice cases is tolled until the date that the doctor ceases to treat the patient for the specific matter at hand. In Ms. Anderson's case, the statute of limitations began to run on February 13, 1994. The

appellate court remanded the case back to the trial court to make a ruling on the issue that was consistent with their opinion.

**Insurance:** In Joseph A. McCauley v. Robert A. Suis, et al., filed on September 3, 1998, the Maryland Court of Special Appeals ruled that in Maryland actions between an insured and his insurer, the realm of law is limited to contract law and thus, tort actions can not be filed. Joseph A. McCauley sued Erie Insurance Exchange after an automobile accident in 1994. During the discovery process, Erie's attorney sent out subpoenas for records deposition of both medical and employment records. A copy of the deposition notice was never sent to the Plaintiff's attorney. When Erie's attorney was notified of the mistake, he offered to immediately resubmit the subpoenas. McCauley filed a complaint against the attorney and Erie for invasion of privacy, fraud, civil conspiracy, and bad faith. The Circuit Court granted the Defendants' motion to dismiss. The appellate court confirmed the trial court's ruling. The court relied upon Johnson v. Federal Kemper Ins. Co. which confines actions between an insured and the insurer to contract law rather than allowing the action to expand to tort proportions.

**Negligence:** In May Lee King v. Brandy Bagent, a minor, etc., filed on September 4, 1998, the Maryland Court of Special Appeals held that previous knowledge of a dog's aggressive tendencies was a prerequisite for a verdict in favor of the Plaintiff concerning a negligence suit where the dog bit the Plaintiff. A six year old child was bitten by Brownie, her great-aunt's dog, at a party where she was in attendance. The dog was tied to a tree per the owner's orders. Apparently the child gave the dog a hug which resulted in twenty-seven stitches in her lip and cheek. The child and her mother sued the dog's owner for negligence. The Montgomery County Circuit Court awarded the Plaintiffs almost \$37,000.00 in damages. The Maryland Court of Special Appeals reversed this judgment on the grounds that the Plaintiffs did not show any evidence of the Defendant's knowledge of the dog's vicious nature and relied on the holding of Shields v. Wagman that established knowledge must be a requisite for a negligence claim to be valid.

**Workmans' Compensation:** In Jung v. Southland Corp., filed on September 15, 1998, the Maryland Court of Appeals affirmed the previous court's decision which denies benefit adjustments to cases of Workmans' Compensation where the rate of pay had increased for the employee after the reoccurrence of initial injury. Benefits for a recurrent injury are based on the employee's weekly salary at the time of the injury. Mr. Peter Hun Kyo Jung was injured at work. He filed a workers' compensation claim which was awarded to him at a rate of two-thirds his average weekly salary which was equivalent to approximately \$288 dollars a week. Three years later, the injury resurfaced. Mr. Jung wanted his current workers compensation to reflect his increased rate of pay as compared to his salary at the initial date of the injury. The Workers' Compensation Commission awarded Mr. Jung an increase in the benefits in accordance with his rate of pay. However, Montgomery County Circuit Court ruled that the amount of benefits must be in accordance with the rate of pay received at the time of the initial injury. The Maryland Court of Special Appeals and the Maryland Court of Appeals both affirmed the trial court's ruling.

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