

Recent Developments in the Law

Vol. No. XXVI

June 2000

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.

This material is being provided for your general information only, and is not a substitute for obtaining legal advice. The information provided is not provided as legal advice, or in the course of an attorney-client relationship. You should always consult an attorney for advice about the specific circumstances of your case.

INSURER HAS A DUTY TO DEFEND EVEN IF SOME CLAIMS ARE NOT COVERED BY THE POLICY

In *Utica Mutual Insurance Co. v. William Ray Miller II, et al.*, the Maryland Court of Special Appeals held that an insurer of an insurance broker has a duty to defend its insured in a tort action even though some claims may be excluded from the policy because other claims were potentially covered.

J.L. Hickman and Co. (JLH) and its employee, William Ray Miller, II, were sued by Insurance Company of North America (CIGNA) claiming conversion, breach of fiduciary duty, unjust enrichment and negligence arising from JHL failing to account for \$326,480.12 in premiums that JLH should have collected. CIGNA claimed that Miller took the money for his own personal use. Utica Mutual Insurance Company, JHL's insurer, refused to defend Miller because the underlying claims fell under the money received exclusion. Miller argued that jury may find that he was not responsible for collecting premiums and would be covered under the insurance policy. The trial court required Utica to defend Miller.

The Court of Special Appeals affirmed stating the duty of an insurer to defend is broader than the duty to pay should Miller be found liable and must reimburse the unaccounted for monies. The duty to defend is based on whether there are any claims raised that are not excluded from the policy. If all of the covered claims are dismissed then Utica's duty to defend ends. *Utica Mutual Insurance Co. v. William Ray Miller II, et al.*, 130 Md. App. 373, 746 A.2d 935 (2000).

NOTICE OF PEELING PAINT IS PROPER NOTICE OF LEAD PAINT HAZARD

In *Brown v. Dermer*, the Court of Appeals of Maryland held that a plaintiff must show that there was loose, flaking, or peeling paint and that the landlord was given notice of that condition to survive a landlord's summary judgment motion where the the landlord denies knowledge of the lead paint hazard.

In 1983, Ms. Brown reported to the Dermers that there was chipping, flaking and peeling paint in her apartment. The Dermers did not correct the situation. At the time, Ms. Brown was pregnant with twins.

In 1985, Ms. Dermer and her two children were diagnosed with lead poisoning. The Baltimore City Department of Health investigated the apartment buildings' condition and found thirty instances deteriorating lead paint hazards. The Dermers were ordered by the Department of Health to correct the problems by January 23, 1986, but the Dermers did not complete the repairs until April 10, 1986.

Ms. Brown brought suit against the Dermers for injuries to her children from lead paint poisoning. The Dermers filed a motion for summary judgment, which was granted by the trial court. The Court of Special Appeals affirmed the trial court's decision.

The Court of Appeals ruled that there was a dispute of material facts concerning notice. The court stated that the existence of peeling paint and notice to the landlord of the peeling paint was sufficient notice. It does not have to be shown that the peeling paint lead based for notice. *Brown v. Dermer*, 357 Md. 344, 744 A.2d 47 (2000).

DIRECT AND CIRCUMSTANTIAL EVIDENCE CAN BE USED TO SHOW THAT A LANDLORD KNEW OR SHOULD HAVE KNOWN OF A LEAD PAINT HAZARD

In *Crest v. Scoken Management Corp.*, the Maryland Court of Special Appeals held that direct and circumstantial evidence that show the defendant knew or had reason to know that a lead paint danger exists defeats a summary judgment motion by the defendants.

Thirty days after Rufus Crest and his mother, Ms. Rosalyn Wilson moved into their apartment, Ms. Wilson notice that the new paint had begun to flake and peel. Later, her son was diagnosed with lead poisoning, and she filed suit on behalf of Rufus, who was a minor. The trial court dismissed the case because the plaintiffs did not provide actual notice to the landlord.

The Court of Special Appeals reversed the trial court. The court stated that the landlords knew or had reason to know that the apartment was painted with lead-based paint. In addition, Mr. Chodak, one of the defendants, had been a party to the *Richwind Joint Venture v. Brunson* case and was held by the court to have superior knowledge of the dangers of lead paint. *Crest v. Scoken Management Corp.*, CSA No. 5360, Sept. Term 1998, Unreported, Filed Mar. 23, 2000.

SLAYER'S RULE DOES NOT APPLY TO CONTINGENT BENEFICIARIES

In *Diep v. Rivas and CNA Ins. Co.*, the Court of Appeals of Maryland held that the Slayer's Rule did not apply to the siblings of Xuang Ky Tran, who murdered his wife and then committed suicide, and that the siblings were entitled to receive the death benefit as contingent beneficiaries under the insurance policy.

Tran had purchased life insurance from his employer for himself and his wife, Maria Rivas. Tran was named as the primary beneficiary and An and Vanessa Diep were named as contingent beneficiaries and Maria Rivas' parents were not.

The Court of Appeals ruled that the Dieps were not claiming Tran's right but had a right of their own as contingent beneficiaries and the Slayer's Rule applies to Tran's right but not the Diep's right. The court further held that Maria Rivas' parents did not have a right to the claim. *Diep v. Rivas and CNA Ins. Co.*, 357 Md. 668, 745 A.2d 1098 (2000).

PARENT-CHILD IMMUNITY BARS PARENTS' SUIT AGAINST CHILD FOR WRONGFUL DEATH EVEN IF THE CHILD IS DECEASED

In *Bushey v. Northern Assurance Company of American*, the Maryland Court of Special Appeals held that parent-child immunity prevents parents from suing one of their children for the death of their other child.

In 1997, Susan Bushey, while trying to pass a slow moving car, was struck head-on, which killed Susan and her sister Miranda. The parents filed a declaratory judgment action as representatives of Miranda's estate against an insurance company for wrongful death caused by Susan to collect under an under-insured motorist provision in the policy. Northern Assurance Co. filed for summary judgment.

The trial court dismissed the case ruling parent-child immunity prevents the parents from suing their daughter. The parents argued on appeal that their suit should be allowed because the daughter being sued is deceased and the insurance company provides the compensation.

The Court of Special Appeals affirmed the trial court decision. Prior Maryland Court of Appeals cases

have ruled that the existence of an insurance company as the source of payment for damages does not nullify parent-child immunity. Parent-child immunity barring wrongful death suits by parents against their children is based on public policies of preventing collusion, fraud and family disharmony. *Bushey v. Northern Assurance Company of American*, 745 A.2d 444 (Md. App. 2000).

COLLATERAL SOURCE RULE REMOVES SUBROGATION RIGHTS IF DAMAGES ARE RULED EXCESSIVE

In *Narayan v. Bailey*, the Maryland Court of Special Appeals held that a trial court could rule that damages awarded in a medical malpractice suit are excessive under the collateral source rule and would remove the subrogation rights of that source, but the existence of a collateral source does not automatically make the damages excessive.

A 1970's law allowed physicians to move for a new trial or remittitur if the damages included medical costs paid by a health insurer. In remittitur, the trial judge reduces a jury award of damages. The intent of the law was to slow increases in medical malpractice premiums.

Dr. Narayan filed a motion for a new trial, which was rejected by the trial court. The trial court found that damages were not excessive because Ms. Bailey would be required to reimburse her insurance company for expenses paid by the insurer under indemnity provisions in the contract.

The Court of Special Appeals vacated that decision stating the collateral source rule eliminates any reimbursement rights if a trial court finds damages to be excessive and reduces the award. However, payment of medical expenses by the insurer does not make the damages excessive. Instead, the trial court has the discretion after reviewing evidence from both sides to decide if damages are excessive. *Narayan v. Bailey*, 130 Md. App. 458 747 A.2d 195 (2000).

INJURIES THAT OCCUR OUTSIDE OF OFFICIAL DUTIES ARE NOT BARRED BY THE FIREMAN'S RULE

In *Rivas v. Oxon Hill JV*, the Maryland Court of Special Appeals held that a deputy sheriff, who slipped on ice in an apartment complex parking lot, was not barred by the "Fireman's Rule" from bringing a negligence suit because he did not fall while executing his duties.

In February of 1995, Jaime Rivas, a sheriff's deputy for Prince Georges County, went to Oxon Hill Village Apartments to serve a subpoena on a witness. Deputy Rivas slipped on some ice in the parking lot of the apartment and was injured. The trial court dismissed the case because firefighters and police officers are precluded from bringing suits for on-the-job injuries under the Firemen's Rule.

The Court of Special Appeals reversed the trial court's granting of the defendant's summary judgment motion stating that Rivas' slip did not fall under the rule because he was not injured while serving the subpoena or any other duty where he would expect to be injured.

The court further ruled the trial court erred in holding that the deputy was only owed a duty by the apartment owner or that of a licensee. If the sheriff is a licensee, the apartment owner has a duty to reasonably inform the deputy of any dangers that are not detectable and known to the owner. Also, the owner has a duty not to willfully or wantonly injure the licensee. Instead, the Special Court of Appeals said the apartment owner owed Rivas a duty of ordinary care because the fall was outside the period of anticipated risk. The case was remanded for trial. *Rivas v. Oxon Hill JV*, 130 Md. App. 101, 744 A.2d 1076 (2000).

STATUTE OF LIMITATIONS DEFENSE DOES NOT APPLY TO THE CONTRIBUTION OF JOINT TORT-FEASOR ACT

In *Jacobs v. Flynn*, the Maryland Court of Special Appeals held that a dismissal of a defendant because his claim falls outside the statute of limitations does not preclude that defendant from being a joint tort-feasor under the Maryland Contribution of Joint Tort-Feasor Act.

Leo Jacobs sued several doctors including Dr. Meade Flynn after becoming paralyzed from an epidermal abscess that was not immediately diagnosed, which damaged his spinal cord. All of the defendants except one took the matter to trial. Dr. Seals settled with Jacobs. A jury found Dr. Flynn and Dr. Thomas MacLean liable and three other doctors not liable and awarded Jacobs \$1.2 million in damages.

The trial court entered a directed verdict in favor of Dr. Flynn based on the statute of limitations and reduced the damages to \$620,000 based on two joint tort-feasors, Dr. MacLean and Dr. Seals. Jacobs argued that Dr. Flynn should have been considered a joint tort-feasor in calculating the damages reduction, as well as, doctors in California that Jacobs had filed suit against.

The Court of Special Appeals ruled that Dr. Flynn was found liable and is a joint tort-feasor even though recovery was barred by the statute of limitations. The court also held that the doctors which have been sued by Jacobs or will be in the future are not joint tort-feasors. The court stated that they do not become joint tort-feasors until a judicial determination of liability is made. In addition, Seals is to be considered a joint tort-feasor based on provisions from Contribution of Joint Tort-Feasors Act. *Jacobs v. Flynn*, 131 Md. App. 342, 749 A.2d 174 (2000).

MARYLAND'S STATUTE OF REPOSE APPLIES TO GENERAL CONTRACTORS AND SUB-CONTRACTORS

In *Hartford Insurance Co. of the Midwest v. American Sprinkler Systems, Inc.*, the U.S. Court of Appeals for the Fourth Circuit held that the immunity granted by Maryland's statute of repose applies to general contractors and subcontractors.

This case arose out of a flood at the holiday Inn in Timonium caused by a break in the sprinkler system standpipe. Hartford sued American Sprinkler System in a subrogation action to recover costs of the water damage. The U.S. District Court granted American's summary judgment motion based on immunity from suit under the statute of repose.

U.S. Court of Appeals ruled that the legislature intended "contractor" in the statute to mean both general contractors and sub-contractors. Also, the court stated that the Legislature intended to provide sub-contractors with a defense in construction suits when the subcontractor was no longer in privity with the owner and could not raise the lack of privity defense.

Hartford Insurance Co. of the Midwest v. American Sprinkler Systems, Inc., 23 F.3d 538 (4th Cir. 2000).

MARYLAND COURT OF APPEALS

Civil Litigation, Summary Judgment: *Imbraguglio v. Great Atlantic & Pacific Tea Co.*, 358 Md. 194, 747 A.2d 806 (2000). Summary judgment was granted against a plaintiff, who fell from an unguarded platform. The evidence most favorable to the plaintiff showed that the elevation of the platform did not require guard rails on the scaffolding according to OSHA requirements. Also the court stated that whether the plaintiff assumed the risk of injury or not was a question of fact for the jury and summary judgment was not appropriate.

Civil Procedure, Requesting strict proof of an issue: *Cooper v. Sacco*, 357 Md. 622, 745 A.2d 1074 (2000). To demand strict proof of any issue listed in Maryland Rules of Civil Procedure 3-308, a defendant in the district court must describe with specificity which issues they request strict proof of at

trial; failure to do so constitutes an admission of the issue.

Civil Procedure, Psychotherapist-patient privilege: Laznovsky v. Laznovsky, 357 Md. 586, 745 A.2d 1054 (2000). A person seeking an award of child custody who claims to be a fit parent does not waive the confidential psychiatrist/ psychologist-patient privilege in respect to his or her past mental health "diagnosis and treatment" communications and records.

Civil Procedure, Statute of Limitations for the Consumer Protection Act: The Greene Tree Home Owners Ass'n. v. Greene Tree Assoc., 358 Md. 453, 749 A.2d 806 (2000). The three-year period of limitations applies on actions under the Consumer Protection Act because Legislature did not intend the act to be a statutory specialty.

Civil Procedure, Statute of Limitations: Faye Lumsden et al. v. Design Tech Builders Inc., 358 Md. 435, 749 A.2d 796 (2000). The statute of limitations begins to run when a homeowner notices a problem and not after the homeowner discovers the cause.

Contracts, Asserting quasi-contractual claims: County Comm'r of Caroline County v. J. Roland Dashiell & Sons, Inc., 358 Md. 83, 747 A.2d 600 (2000). Quasi-contractual claims such as quantum meruit and unjust enrichment generally cannot be asserted when an express contract defining the rights and remedies of the parties exists.

Criminal, Self-defense applied to reckless endangerment charges: Jones v. State, 357 Md. 408, 745 A.2d 396 (2000). The trial court erred by refusing to instruct the jury that self-defense applied to the reckless endangerment charges; common law self-defense is a viable defense to the statutory crime of reckless endangerment under Md. Ann. Code Art. 27, §2A-2(a)(1).

Criminal, Pepper spray as a dangerous or deadly weapon: Handy v. State, 357 Md. 685, 745 A.2d 110 (2000). Pepper spray, while not per se a dangerous or deadly weapon, may be one if it can be used to cause injury or to inflict serious bodily harm.

Criminal Procedure, Ineffective assistance of counsel: Lettley v. State, 358 Md. 26, 746 A.2d 392 (2000). The defendant's Sixth Amendment right to effective assistance of counsel was violated where the circuit court refused to allow the defendant's attorney to withdraw and to allow the defendant to obtain new counsel when the attorney had another current client who had confessed to the attorney to the crime with which the defendant was charged.

Estates & Trusts, Nonclaim statute does not allow setoffs based on untimely made claims: Imbesi v. Carpenter Realty Corp., 357 Md. 375, 744 A.2d 549 (2000). Md. Code Ann. Estates & Trusts § 8-103 does not allow a claim that has not been timely made and arose out of a transaction separate from any claims made by the estate, even if the debtor to the estate voluntarily limited the setoff amount.

Family, Termination of parental rights: In re Adoption/ Guardianship No. T97036005 358 Md. 1, 746 A.2d 379 (2000). A child who is the subject of a petition to terminate parental rights is a party to the proceedings, and, if he or she timely objects to the petition, is entitled to a hearing on the merits of the petition.

Family, Fraud and intentional infliction of emotional distress: Jane Doe v. John Doe, 358 Md. 113, 747 A.2d 617 (2000). Maryland law does not recognize a husband's tort actions of intentional infliction of emotional distress caused by the wife's alleged adultery or fraud based on the wife's misrepresentation of the paternity of the children.

Insurance, No reimbursement for HMOs: Victor G. Riemer et al. v. Columbia Medical Plan, Inc., 358 Md. 222, 747 A.2d 677 (2000). A HMO can not collect in restitution, reimbursement, or subrogation for

medical services paid under its plan if members collect damages from third-party tort claim.

Juvenile, Jurisdiction over minors: *In re Darren M.*, 358 Md. 104, 747 A.2d 612 (2000). The district court did not have the authority to exercise criminal jurisdiction to adjudicate misdemeanor offenses filed against a seventeen year old minor.

Professional Responsibility, Failure to file tax returns: *Attorney Grievance Commission v. Atkinson*, Misc., 357 Md. 646, 745 A.2d 1086 (2000). Prolonged failure to file income tax returns constitutes a violation of Rules 8.4(b), (c) and (d) even where there is no criminal prosecution for such failure.

MARYLAND COURT OF SPECIAL APPEALS

Civil Procedure, Personal jurisdiction: *Ellen M. Zaviani v. Julie Foudy, et al.*, 130 Md. App. 689, 747 A.2d 764 (2000). The circuit court lacked personal jurisdiction over the out of state appellees because they lacked "continuous and systematic" contacts with Maryland as required by the due process clause of the Fourteenth Amendment.

Civil Procedure, Qualified privilege in defamation action: *Darvish v. Gohari*, 130 Md. App. 265, 745 A.2d 1134 (2000). Based on franchisee's express consent authorizing franchisor to solicit information from his former employer, and the business relationship between franchisor and franchisee, former employer was entitled to a qualified privilege in defamation suit by former employee.

Civil Procedure, Sanctions and dismissal for failure to comply with an medical examination order: *Wilson v. N.B.S., Inc.*, 130 Md. App. 430, 746 A.2d 966. A lawyer is not responsible to pay the "no show fee" for a client that does not comply with a court-ordered medical exam unless a showing is made that the lawyer advised the client to disobey the order. Also, a case can be dismissed if the order is not followed, but the plaintiff must be allowed to request a hearing before the dismissal is entered.

Contracts, Parol Evidence Rule: *Tricat Industries Inc., et al. v. Paul E. Harper*, 131 Md. App. 89, 748 A.2d 48 (2000). Parol evidence is admissible to show that a written agreement in question was not intended as a contract or a binding record of the contract.

Contracts, Permissible rate for late charges: *Stroh v. Omni Arabians, Inc.*, 131 Md. App. 178, 748 A.2d 1015 (2000). All late fees on a contract are subject to the statutory maximum rate of 6% unless a statutory exception is granted.

Insurance, Last clear chance doctrine: *Burdette v. Rockville Crane Rental, Inc.*, 130 Md. App. 193, 745 A.2d 457 (2000). The doctrine of last clear chance applies to sequential events, and not concurrent events. Whether a driver is characterized as inattentive or not because the driver did not react when the car first became visible is immaterial since the 0.9 second crossover period was not "an event separate from the events constituting the collision."

Insurance, Underinsured-motorist's carrier consent to settlement period: *Keeney, v. Allstate Insurance Co.*, 130 Md. App. 396, 746 A.2d 947 (2000). The 60-day period for an underinsured-motorist's carrier to consent to settlement applies only to relevant tort actions and not contract disputes between the insurer and the insured.

Real Property, Md. Code Ann. Real Property § 7-106(c)(1) has an irrebuttable presumption of payment: *Helman v. Kim*, 130 Md. App. 181, 745 A.2d 451 (2000). The trial court correctly concluded that there was an irrebuttable presumption that an unreleased mortgage was paid twelve years after the date of last payment, which is in keeping with Md. Code Ann. Real Property § 7-106(c)(2), which provides for the automatic termination of mortgage liens.

Real Property, Ability to file suit: *Chaire v. Chevy Chase Bank, FSB*, 131 Md. App. 64, 748 A.2d 34

(2000). In 1998, A borrower brought suit against a lender and was estopped by the Court of Appeals from bringing suit under the Secondary Mortgage Lending Law. The borrower brought suit again for violations by the lender under the same law arguing the previous gave the lender notice of the statutes applicability. The Court of Appeals ruled that the passage of time did not cure the borrower's actual conflict of interest and failure to disclose a prior lien, which caused the initial ruling.

Real Property, A warranty to 'repair or replace' is not a future performance warranty: Joswick, v. Chesapeake Mobile Homes Inc., 130 Md. App. 493, 747 A.2d 214 (2000). A warranty for future performance must be clearly written as future performance, and the warranty to 'repair and replace' provided a specific remedy but did not explicitly indicate any future performance.

Real Property, Election of relief: Merritt v. Craig, 130 Md. App. 350, 746 A.2d 923 (2000). Reported. Opinion by Davis, J. Filed Feb. 2, 2000. For breach of contract in real property sales, the plaintiffs must elect whether to sue for equitable rescission or damages at the beginning of the trial because, if a suit is brought for damages, then rescission cannot be granted later.

Torts, Invasion of privacy: Furman v. Sheppard, 130 Md. App. 67, 744 A.2d 583 (2000). There was no claim of invasion of privacy against an investigator, who was trespassing and videotaped the plaintiff, because the investigator only recorded activities in plain view. Trespassing is only relevant to invasion of privacy when the trespasser invades an area in which a person possesses a reasonable expectation of privacy.

VIRGINIA SUPREME COURT

Insurance, Refusal to pay claim and bad faith: Nationwide Mutual Insurance v. St. John, 259 Va. 71, 524 S.E.2d 649 (2000). The insurer's failure to pay the balance of the defendant's medical bills constituted bad faith because the insurer did not provide medical evidence to show that the injuries were not caused by the May 14, 1994 accident, and that subsequent medical treatment did not relate to injuries from the accident or further treatment was unnecessary.

SAUNDERS and SCHMIELER, P.C.
LAW OFFICES