

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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MARYLAND COURT OF APPEALS

Torts, Assumption of Risk: *Crews v. Hollenbach*, 358 Md. 627, 751 A.2d. 481 (2000). The assumption of the risk doctrine barred a negligence suit brought by a private gas company worker against a cable company, excavating company, and engineering company to recover for injuries he sustained in a natural gas explosion that occurred during his attempt to repair a gas leak. The worker knew and appreciated the risk of confronting the gas leak, and he voluntarily assumed the risk since the danger he encountered was the very danger that he accepted the risk of confronting when he became an employee of the gas company.

Insurance, Enforceability of Nonassignability Clause: *Clay v. Government Employees Insurance Company*, 356 Md. 257, 739 A.2d 5 (1999). Nonassignability clause in an automobile insurance policy is not contrary to public policy and is enforceable against a physician who treated the insured in return for an assignment of the uninsured motorist benefits, even if some accident victims would not receive treatment without an assignment of benefits. The intended direct beneficiary of uninsured motorist coverage is the accident victim, not health care providers or other creditors of the insured.

Insurance, Disclosure of Policy Limits: *Farley v. Allstate Insurance Company*, 355 Md. 34, 733 A.2d 1014 (1999). When the amount of coverage is not at issue, the jury should not be made aware of the policy limits when an insurer is being sued for nonpayment of under insured benefits. Unless the amount of coverage itself is in controversy, the admission of the policy limits into evidence would probably be unduly prejudicial.

Workers' Compensation: *Sealy Furniture v. Miller*, 356 Md. 462, 740 A.2d 594 (1999). Where the employer has inadvertently overpaid benefits for a worker's temporary total disability (TTD), the Workers' Compensation Commission may not apply the overpayments as an offset against a subsequent award of permanent partial disability (PPD) benefits. TTD and PPD are separate compensable events and the legislature did not intend an overpayment of one benefit to be credited against the award of another kind of benefit.

Insurance, Third-Party Beneficiaries, Statute of Limitations: *Jones v. Hyatt Insurance Agency*, 356 Md. 639, 741 A.2d 1099 (1999). When a third party injured by a driver learns that an agency failed to secure coverage for the driver, and the driver thought he was insured, the third party does not have a direct cause of action against an agent under tort law but must sue as at third-party beneficiary under contract law. Moreover, the statute of limitations begins to run from the discovery of the agency's breach of contract, not from when the injured party won a judgment against the driver.

Insurance, Entitlement to PIP Benefits: *Maryland Automobile Insurance Fund v. Perry*, 356 Md. 668,

741 A.2d 1114 (1999). Statute that prohibits an insurer from paying personal injury protection (PIP) benefits to a person in violation of insurance requirements did not disqualify the owner of an uninsured vehicle from recovering PIP benefits for injuries while driving his insured vehicle because the statute is intended to disqualify only those persons who deliberately waived PIP coverage under their own policy.

Evidence, Admissibility of Medical Records: *Shpigel v. White*, 357 Md. 117, 741 A.2d 1205 (1999). Where a causal connection between accident and injury is not obvious and within the common knowledge of a layman, expert medical testimony may be necessary for the admissibility of medical records.

Torts, Qualified Immunity: *Shoemaker v. Smith*, 353 Md. 143, 725 A.2d 549 (1999). Under the Maryland Tort Claims Act, when qualified immunity is asserted as a defense, the standard for determining the malice necessary to defeat the asserted defense is actual malice, i.e., conduct motivated by ill will, improper motive, or affirmative intent to injure.

Tort, Qualified Immunity, Summary Judgment: *Okwa v. Harper*, 2000 WL 1036284, CA No. 129 Sept. Term 1999. Trial court erred in finding that policemen did not act with malice as a ground for finding them immune from the §1983 civil rights count. The trial court also erred in concluding as a matter of law at the summary judgment stage that the policemen have qualified immunity from the §1983 cause of action.

MARYLAND COURT OF SPECIAL APPEALS

Civil Procedure, Dismissal for Delay in Service of Process: *Reed v. Cagan*, 128 Md.App. 641, 739 A.2d 932 (1999). A defendant may file a motion to dismiss for delay in service under Rule 2-507(b) directly with the court and is not obligated to petition the clerk's office to initiate the action.

Workers' Compensation, Employer's Credit for Previous Payments: *Anne Arundel County v. Tierney*, 132 Md.App. 149, 751 A.2d. 35 (2000). When a worker's compensation award is increased upon judicial review, the employer is not entitled to a credit based on the number of weeks for which benefits were previously paid, but rather, for the total amount of money actually paid to the claimant prior to the increase.

Intentional Torts: *Johnson v. VALU FOOD, Inc.*, 132 Md.App. 118, 751 A.2d 19 (2000). Actual damages need not be alleged with specificity in an intentional tort suit. Upon failure of proof of actual damages, the plaintiff would still be entitled to nominal damages. Plaintiff merely alleging that the harm she suffered flowed from the alleged false imprisonment and batter was sufficient to plead general damages.

Civil Procedure, Timeliness of Filing Petitions: *In re Vy N.*, *In re Dat T.*, *In re Kyle K.*, *In re Donald S.*, 131 Md.App. 479, 749 A.2d. 247 (2000). Nothing in Rule 1-322 or otherwise in the Rules provides that anything delivered to a clerk after 4:30 p.m. is deemed to have been filed on the next day that the Clerk's Office is open. Petitions delivered to the clerk's office after it closes are filed at the time of delivery, even though a clerk may stamp them as filed on the next day.

Torts, Defamatory Nature of Student Complaints: *Flynn v. Reichardt*, 131 Md.App. 386, 749 A.2d 197 (2000). Statements by high school students and their parents that a teacher committed sexual abuse, sexual harassment, and sexual discrimination were not absolutely privileged because, under the Gersh test, adequate procedural safeguards which would minimize the occurrence of defamatory statements were not present. The parents' complaint was not duly sworn, there was no adversary public hearing, there were no sworn witnesses subject to cross-examination, no counsel were present during any portion of the investigation, there was no analysis of the investigation's findings, procedural safeguards were unavailable during the investigation, and under the school's regulations an appeal was unavailable. Thus,

the statements by the students and parents were not absolutely privileged.

Evidence, Subsequent Remedial Measures: *State v. Thurston*, 128 Md.App. 656, 739 A.2d 940 (1999). Following an accident involving the plaintiff's horse, evidence that the state began closing a gap in the fence through which the horse had plunged and injured itself was inadmissible as a subsequent remedial measure and also not admissible under the feasibility exception to that rule.

Insurance, Scope of Uninsured Motorist Provision: *Wright v. Allstate Insurance Company*, 128 Md.App. 694, 740 A.2d 50 (1999). Insured who were shot while driving their car cannot recover for their injuries under the uninsured motorists provision in their liability insurance policy. The shooter emerged from a parked car and opened fire on the insureds while they were stopped at a stop sign. The gunshot injuries did not arise out of the tort-feasor's use of a motor vehicle and thus the insureds are not entitled to uninsured motorist benefits. The tort-feasor's vehicle was just the means of transportation to and from an area where he predicted the insureds would be, and its use was incidental to the crime and not directly, causally, connected to the incident.

Insurance, Subrogation Rights: *Stancil v. Erie Insurance Company*, 128 Md. App. 686, 740 A.2d 46 (1999). Because the insured assigned the right of subrogation of a homeowner's insurance policy to the insurer, the insurer paid the insured the amount it owed under the policy, and there was no dispute about the terms of the policy itself, the insurer had the right to subrogation with respect to the proceeds of an automobile insurance policy otherwise payable to the insured. Homeowners' insurer that paid policy limits for a fire destroying insured's house as a result of an automobile accident was entitled to subrogation from the drivers of the automobiles before the insured was made whole. The insured's failure to insure his property adequately created no responsibility on the part of the insurer to make insured whole by paying insured more than policy limits of the contract before engaging in subrogation.

Products Liability, Defective Design of Automobile: *Nissan Motor Co. LTD. v. Nave*, 129 Md.App. 90, 740 A.2d 102 (1999). A manufacturer may be strictly liable for injuries caused by a defective product if a consumer demonstrates that it was feasible to employ a safer design that would be accepted by consumers and which did not alter the function of the product.

Insurance, Uninsured Motorist Coverage for Car jacking: *Webster v. Government Employees Insurance Co.*, 130 Md.App. 59, 744 A.2d 578. In a case of first impression, the Maryland Court of Special Appeals held that the insureds were not entitled to uninsured motorist benefits for the death of their daughter during a Car jacking. Because the car jacker was not physically inside or in control of the vehicle during the car jacking, the gunshot injuries did not arise out of the ownership, maintenance, or use of the uninsured motor vehicle, but rather arose out of an assault.

Insurance, Benefits for Work-Related Injuries: *Maryland Insurance Administration v. Maryland Individual Practice Association*, 129 Md.App. 348, 742 A.2d (1999). Payment for services rendered in connection with a claim which may be covered by workers' compensation need not be paid by an insurer within thirty days if such payments are excluded from the health plan.

Negligence, Boulevard Rule: *Brendel v. Ellis*, 129 Md.App. 309, 742 A.2d 1 (1999). Driver breached his duty of care to other motorists and to his passenger when traveling on an unfavored street and attempting to inch past a stop sign, and driver is negligent as a matter of law.

Negligence, Psychiatrist's Duty to Warn: *Falk v. Southern Maryland Hospital*, 129 Md.App. 402, 742 A.2d 51 (1999). A mental health provider is not liable under a malpractice claim for the violent behavior of his or her patients unless he or she had actual knowledge of the patient's propensity for violence and the patient indicates an intent to harm a specific victim.

Insurance, Bodily Injury Exclusion: *Philadelphia Indemnity Insurance v. Maryland Yacht Club*, 129

Md. App. 455, 742 A.2d 79 (1999). Former employee's claim to recover for wrongful discharge for filing a workers' compensation claim did not arise out of bodily injury, and thus, exclusion in insurance policy for loss arising out of bodily injury did not apply. The nexus between the wrongful discharge action and the bodily injury claim was too attenuated.

Negligence, Intoxicated Passenger: Faith v. Keefer, 127 Md.App. 706, 736 A.2d 422 (1999). Where the evidence was insufficient to show that the deceased passenger of an automobile knew the defendant was intoxicated or that the passenger appreciated the risk of danger, the defendant, who drove while intoxicated causing an accident which killed the passenger, is not entitled to summary judgment in a wrongful death claim.

Torts, Intentional Infliction of Emotional Distress: Borchers v. Hrychuk, 126 Md.App. 10, 727 A.2d 388 (1999). A person who seeks counseling cannot recover for intentional infliction of emotional distress absent an officially sanctioned treatment relationship. A pastor's alleged conduct in exploiting his position to initiate a sexual relationship with a church member who consulted him for advice concerning marital difficulties was not "extreme and outrageous" because there was no officially-sanctioned treatment relationship between the parties, such as the psychiatrist and patient relationship, and thus no recovery was warranted for intentional infliction of emotional distress.

Negligence, Contributory Negligence, Sanctions: Union Memorial Hospital v. Dorsey, 125 Md.App. 275, 724 A.2d 1272 (1999). Trial court erred in determining as a matter of law that plaintiff, a bank employee, was not contributorily negligent as a matter of law when she slipped and fell after she entered cluttered hospital room to replenish money in ATM. Trial court did not abuse its discretion in declining to impose sanctions on plaintiff for inadequate answers to interrogatories in the absence of an order to compel plaintiff to answer interrogatories by defendant.

Insurance, Right to Intervene: Bliss v. Wiatrowski, 125 Md.App. 258, 724 A.2d 1264 (1999). Plaintiff's insurer can file a motion to vacate a default judgment on behalf of the defendant who is an uninsured motorist. Plaintiff's insurer and the uninsured motorist's interests are intertwined and fairness dictates that the insurer, who can be bound by such a judgment, should be able to step into the shoes of the uninsured motorist and file a motion to vacate.

D.C. COURT OF APPEALS

Police and Firefighters Retirement and Disability Act: Mayberry v. Dukes, 742 A.2d 448 (D.C. 1999). The Police and Firefighters Retirement and Disability Act was not the exclusive remedy for employees subject to the Act that were injured by an intentional tort of a co-employee, and thus, a police officer's battery claim against a co-employee who shot him while they were on duty, was not barred by the Act.

Trial Practice, Special Verdict: Newell v. District of Columbia, 1999 WL 1092545 (D.C.App). Appellants were estopped from challenging the jury instructions on contributory negligence and assumption of the risk where they did not request a special verdict on those issues. Counsel in a civil case is required to request a special verdict form to preserve a claim of error relating fewer than all of the theories of liability on which the jury could have based its verdict, and in requesting a special verdict, counsel must state the request with sufficient precision to indicate the specific interrogatories that should be included in the special verdict form, object to their non-inclusion, and include the proposed special verdict form in the record on appeal.

Landlord and Tenant: Young v. District of Columbia, 752 A.2d 138 (D.C. 2000). Summary judgment for defendant landlord in a summary eviction case was improper where a disputed issue of fact existed as to whether the plaintiff was on the property as a guest or had an oral agreement to occupy the premises in

exchange for rent. The landlord-tenant relationship does not arise by mere occupancy of the premises.

Evidence, Hearsay: *Puma v. Sullivan*, 746 A.2d 871 (D.C. 2000). A statement in an affidavit of an offer to modify a promissory note by extending the due date is a verbal act and not hearsay because it is not being used for the truth of the matter asserted, but rather simply being used to prove the words of an offer were spoken, and therefore, the statement can properly be considered to raise an issue as to the statute of limitations for summary judgment purposes.

Civil Procedure, Jurisdiction: *Shoppers Food Warehouse v. Moreno*, 746 A.2d 320 (D.C. 2000). Trial court did not err in exercising personal jurisdiction over a nonresident grocery store in slip and fall case brought by a D.C. resident which occurred in Maryland. The defendant Maryland store engaged in extensive advertising in D.C. newspapers and purposefully availed itself to the benefits and protections of D.C. by soliciting D.C. residents as customers for its Maryland and Virginia stores.

Negligence, New Trial: *Madison v. Superior Iron Works*, 746 A.2d 343 (D.C. 2000). In a personal injury action against a general contractor and subcontractor arising from a worker's fall at a construction site, the construction worker adequately preserved the issue of whether he was entitled to a new trial on the issue of proximate causation as well as damages based on newly discovered evidence. Although the plaintiff captioned his motion as one seeking a new trial solely on the issue of damages, in his memorandum in support of the motion he argued that with the benefit of newly discovered evidence the jury's verdict would have been different on the issue of proximate cause and damages, and it was apparent from the trial court's order that the court gave due consideration to the plaintiff's argument as it related to proximate cause.

U.S. DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil Rights, Punitive Damages: *Williams v. Cloverleaf Farms Dairy*, 78 F.Supp.2d 497 (D.Md. 1999). An employer cannot be held liable for punitive damages, absent fault, for an employee's violation of the federal race discrimination statute 42 USC 1981 because the employee who committed the offense was not a manager, the employer had not authorized or ratified her actions, and the employer had not been negligent in hiring employee.

U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

Torts, Malicious Prosecution: *Brice v. Nkaru*, 2000 WL 961595, US4th 99-1646 (2000). Evidence was insufficient to support the inference that a security guard acted in bad faith when he provided law enforcement officers with incorrect information that led to the arrest of plaintiff for a crime plaintiff did not commit. A witness, by honestly providing information to a law enforcement official, may not be held responsible for the official's execution of his independent duty to investigate. The security guard did not "institute" or "procure" any criminal prosecution for the purposes of liability for malicious prosecution where he simply reported the occurrence of a crime to the police and responded to the police requests that he verify the suspect's identity.