THE DEFENSE LINE

A Publication From The Maryland Defense Counsel, Inc.

Winter 2005

Important Announcements

The Maryland Jury
Tuesday, March 29
7:45 a.m.–7 p.m.

Annual Crab Feast
June 8, 2005
5:30 p.m.

Visit **mddefensecounsel.org** for details

High Crimes or Misdemeanors: Avoiding Legal Brawls From Bar Room Brawls[1]

By Joseph W. Hovermill and Matthew T. Wagman

It is a typical Friday night in Canton and your restaurant and bar is open for business. The place is crowded, every table is full and the bar is two people deep. Out of nowhere, a fight ensues and you see two men in the bar (one of whom is bleeding) struggling to gain control over a knife. Within seconds, the bouncers and bartenders have separated the two men and the paramedics are in route to care for one your patrons who has suffered multiple stab wounds as a result of the independent act of a third party. Are you civilly liable to that patron? The answer may surprise you.

According to the Federal Bureau of Investigation's Uniform Crime Report, approximately 38,778 violent crimes were reported in Maryland in 2003. In a time of heightened sensitivity to security issues, Maryland businesses should be sensitive to their potential liability for injuries to business invitees—even if that injury comes from the independent criminal act of a third party.

I. Your Instincts May be Right Absent Special (or not so special) Circumstances.

If you polled a number of Maryland business owners and asked for their opinions on the hypothetical narrated above, you would likely find that many, if not most, believe that, although in our modern litigious society, their business might be sued for injuries sustained in an assault, they ultimately should not be held legally responsible. As a general rule, the law reflects those notions, but lurking exceptions to the general rule may provide businesses with unanticipated liabilities.

Absent unusual circumstances, a patron seeking to recover for injuries sustained as a result of third party criminal acts on the premises of a business would likely be limited to a negligence theory against the business. It is a fundamental principle of tort law that in order to prevail on a negligence action, a plaintiff must prove that the defendant owed a legal duty and that the plaintiff suffered actual loss factually and proximately caused by a breach of that duty. *See e.g. Peroti v. Williams*, 258 Md. 669, 669, 267 A.2d 114, 118 (1970); *see also Brown v. Dermer*, 357 Md. 344, 356, 744 A.2d 47, 54 (2000). A business owner's instincts that the business should not be liable for injuries to its patrons resulting from third party criminal acts are validated by the hurdle such a plaintiff faces in attempting to establish any legal duty to protect him from the crime. The potential existence of such a duty is the focus of this article.[2]

Generally speaking, what duty does a Maryland business owe to its patrons? This, like all other questions of the existence of a duty, is a question of law for the court. *Jackson v. A.M.F. Bowling Ctrs.*, Inc., 128 F. Supp. 2d 307, 311 (D. Md. 2001)

Continued on page 9

[1] *Joseph W. Hovermill is a principal and Matthew T. Wagman is an associate of the law firm Miles & Stockbridge P.C. in Baltimore, Maryland. While their practice predominantly focuses on representation of the manufacturing industry, they also have extensive experience representing various companies in commercial disputes and premises liability cases on both the local and national level. The authors wish to thank Michael L. Haslup for his assistance with this article.*

[2] *Although, in addition to questions of the existence of a legal duty, third party criminal acts can raise questions regarding proximate causation, the element of proximate causation does not arise until a legal duty is established, and the analysis of proximate causation is somewhat parallel to that of legal duty in that both center on an analysis of foreseeability, therefore this article addresses only the question of the existence of a legal duty.*

President's Message

In 2005, civil justice is in the air. This has provoked a new MDC undertaking, the Civil Justice Project, which is detailed elsewhere in this *Defense Line*. While the Civil Justice Project envisions legislative action, the Court of Appeals has taken up the question of admitting expert evidence, and accepted MDC as an amicus on that subject. *CSX Transportation, Inc. v. Donald E. Miller*, Court of Appeals, September Term 2004, Petition Docket No. 460. Not only will we be heard but the amicus brief of MDC in the Court of Special Appeals and our support of the cert petition significantly bolstered the effort to get this subject before the Court of Appeals.

Gardner M. Duvall, Esquire

Whiteford, Taylor & Preston, LLP

Medical malpractice, and the threat that the cost of insurance imposes on access to medical care, is the obvious cause of the current interest in this topic in the General Assembly. Governor Ehrlich has vetoed the legislation passed in the Special Session held at the end of 2004, and the General Assembly then overrode the veto by the thinnest of margins. The evolution of this bill, and MDC's input on the subjects of the bill, are worthy reviewing.

The impetus for the Special Session was a reinsurance fund intended to take a sting out of the 2005 increase in med mal insurance premiums. The major fight on this subject is the funding source. The Governor had legislation introduced that would limit all non-economic damages in med mal cases to $650,000.00, including non-economic wrongful death damages. Past medical expenses would be compensated at the rate of reimbursement received by or due to the care provider. Future medical expenses would be presumptively compensated at 140% of the Medicare reimbursement rate. Various other litigation reforms were in the Administration Bill, including the abolition of Health Claims Arbitration, and new requirements for ADR of med mal claims.

In the House, Speaker Busch introduced legislation that improved on the Governor's bill in two ways. The House Bill would impose *Daubert* requirements on expert evidence in all civil litigation. It also would have permitted more than six jurors in all civil trials. The House passed this bill, which went to conference with the bill the Senate passed. The Administration bill was defeated in both chambers, though it seems likely that Governor Ehrlich could have signed the House bill if the reinsurance funding source in it had been acceptable to him.

In conference, the good work in the House was eliminated. *Daubert* was eliminated. The number of civil jurors was returned to the current law. The non-economic damages cap was raised to 125% of $650,000, in cases with more than one wrongful death claimant. A provision restricting the practice of attorneys bringing three or more med mal cases without substantial justification was stricken.

MDC had an impact on the Special Session. We do not know of anyone else urging the legislative adoption of *Daubert*, while MDC devoted substantial energy to getting this matter into the legislative view. Another aspect of our Civil Justice Project is the reduction of compensation for medical costs to the actual reimbursement paid or owed to providers for these services. We have urged an increase in the number of civil jurors in the last three Sessions.

The maneuvering in the Special Session holds many lessons. We are being heard on our critical concerns. The House passed a bill on some esoteric issues, which currently disadvantage civil defendants. The Senate looks like a real obstacle to reform. Plaintiffs' attorneys seem more concerned with keeping inflated economic damage claims than with a reduction of the limit on non-economic damages, at least in the medical malpractice arena. The same comparison holds true with regard to *Daubert* and with increasing the number of civil jurors.

The 2005 General Assembly session should be very interesting, after several years without much happening in the tort arena. Stay tuned, let us know your concerns, and be prepared to pound out short letters, e-mails, and phone calls to your representatives in Annapolis.

Maryland Defense Counsel Civil Defense Project

The Board of Maryland Defense Counsel has launched its Maryland Civil Justice Project. The purpose of this legislative effort is to ensure that there is adequate evidence in support of civil awards, and that those awards be valued according to sound and fair economic principles.

An ad hoc Civil Justice Committee has been formed to further this effort. The Civil Justice Committee is chaired by J. Mark Coulson of Miles & Stockbridge. Its other members are Steve Caplis, Dwight Stone, and Jennifer Jackman (all of Whiteford, Taylor & Preston), and Joseph Beavers and Michael Haslup (both with Miles & Stockbridge). The three aspects of the Civil Justice Project follow.

Properly Valuing Past and Future Medical Expenses in the Age of Managed Care

Successful personal injury claimants can recover past and future medical expenses. The Civil Justice Project seeks to ensure that these damages are valued according to the actual cost of obtaining the care.

Historically, physicians bill for their services, and then the issue in civil cases is whether those bills are "fair reasonable". "Fair and reasonable" in this context means that the services were necessary, and that the bill for those services is not excessive.

A revolution has occurred in this field, however, with care providers accepting less than the billed amount as full payment, pursuant to managed care arrangements. Similarly, care providers may accept Medicare or Medicaid reimbursement rates as full payment for patients qualifying for that benefit.

Plaintiffs currently claim the full "fair and reasonable" billed amount as their medical loss damages, without regard to the care providers accepting less than the billed amount as payment in full. The only meaningful value of these services is the one that is expected by the provider to be full payment when the bill is rendered. The Civil Justice Project intends to eliminate the excessive "compensation" of medical losses that is a historical accident of changing medical billing and collection processes.

In practice, the health care provider's "standard rate" is like a car dealer's "sticker price." It is a non-market rate that virtually no consumer pays. Outside of the court system, therefore, no reasonable person argues that the cost of the care was anything other what the health care provider has agreed to accept as full payment.

The Civil Justice Project does not run afoul of the collateral source rule, because the actual cost of medical care will be compensated. The difference between the billed rate and the reimbursed rate is never going to be paid by anyone, including a collateral source, so changing the compensation rate to match economic reality presents no windfall to anyone.

As a final matter, it is typical in catastrophic birth injury obstetric cases that the substantial monies awarded for future care are put into a so-called special needs trust so that the child remains eligible for Medical Assistance even after the verdict. There is no justification for awarding future care dollars at billed rates when Medical Assistance will strike a better bargain for that care.

Continued on page 4

Editor's Corner

This edition of *The Defense Line* features a lead article from Joseph W. Hovermill and Matthew T. Wagman discussing avoiding Legal Brawls from Bar Room Brawls. We also have several interesting articles that analyze recent decisions by the Court of Appeals. Barry C. Goldstein of Waranch & Brown, LLC examines the case of *Patton v. USA Rugby, et al.*, where the Court of Appeals ruled that "a special relationship" does not exist between the organizers and referees of an adult amateur sporting event. Michael J. Sepanik of Carr Maloney P.C. discusses the case of *Tierco Maryland, Inc. v. Linda Williams, et al.*, where the Court of Appeals held that gratuitous and repeated references to race, and the strong reactions of the jury to the race-tinged testimony caused such prejudice to the owners of a theme park that they were denied a fair trial. Charles E. Wilson, Jr. and Amy L. Leone of McCarthy Wilson examine the case of *Montgomery County Board of Education v. Horace Mann, Ins. Co.*, where the Court of Appeals held that under the Annotated Code of Maryland, a school board was required to defend a teacher accused of sexual and other forms of abuse. Finally, the editorial staff and Barbara McClellan Stanley continue to follow HIPAA court treatment of interviews of treating physicians.

The Editors of *The Defense Line* want to make the readers aware of the All day Symposium to examine the civil jury system in Maryland presented by the Council on Jury Use and Management, the Maryland Trial Lawyers Association, and the Maryland Defense Council, Inc. on March 29, 2005. Speakers will include prominent jurists, jury commissioners, and jurors from recent cases.

The Editors continue to hope that our readers find *The Defense Line* to be beneficial. If you have any comments or suggestions or would like to submit an article for a future edition of *The Defense Line*, please feel free to contact the Editors, Alexander Wright, Jr., (410) 823-8250, or Matthew T. Wagman, (410) 385-3859.

Editorial Staff

(MDC CIVIL DEFENSE PROJECT) *Continued from page 3*

Eliminating the Post-Judgment Interest Windfall

Post-judgment interest in Maryland is set at a fixed 10% per year by statute, running from the date of the judgment. Section 11-107, Md. Cts. & Jud. Proc. Code Ann. For years, this rate has been well above current rates of return. Section 11-107 provides a windfall by, in effect, yielding an investment that substantially outperforms the market.

Maryland should adopt the federal practice, where the post-judgment interest rate is tied to prevailing rates of return. See 28 U.S.C. 1961. That rate in the recent past has been in the range of 1.5% to 2.5%, but, more importantly, reflects a market rate rather than an artificial rate. A market rate is equitable because it results in neither an excessive cost nor an inadequate return on the value of money pending the completion of the judicial process.

Updating the standard for admissibility of expert testimony

The opinions of expert witnesses play a central role in many civil cases, particularly high-value cases. The United States Supreme Court has adopted a rule for admitting expert testimony intended to determine whether the opinion has a sufficient basis. In effect, the test is whether experts within the field of inquiry would find that there is a sufficient basis for the opinion. If knowledgeable experts in a field consider an opinion to lack a sound factual basis or method, there is no reason that a jury composed of citizens should be able to find that the opinion is well-founded.

The Maryland decisions lack the singular, appropriate focus of the federal law concerning expert evidence. This leads to unpredictable verdicts and unfairness to all litigants. This is a matter of particular concern to businesses and others who have to conform their practices to legal requirements. It is virtually impossible to conform to a standard of "reasonable care" if an unfounded opinion about that standard subjects the defendant to unpredictable and unfair liability. There is nothing that is more likely to improve the administration of justice in Maryland to ensure that verdicts are rendered for the meritorious side.

The admissibility of expert testimony is governed by Rule 5-702 of the Maryland Rules, which provides that the court must determine "(1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony." Md. Rule 5-702. Although Maryland Rule 5-702 is similar to its federal counterpart, it has not been interpreted consistently with the federal practice.

There is a well-developed body of jurisprudence interpreting Federal Rule 702, intended to verify that expert testimony meets minimum standards for competence and reliability. In particular, the Supreme Court's decisions in *Daubert v. Merrill Dow Pharmaceutical, Inc.*, 113 S.Ct. 2786 (1993) and its progeny task the trial court with acting as "gatekeeper," ensuring that prior to the admission of expert testimony, the testimony "both rests on a reliable foundation and is relevant to the task at hand." Id. at 2790. The federal practice gives the jury a more reliable basis for its verdicts, and safeguards against "hired gun" experts call by any party, sides who base their opinions merely on their own say-so.

HIPAA: The Basics

By Barbara McClellan Stanley and The Editors of The Defense Line

In the Winter 2004 edition of *The Defense Line*, Kathleen D. Leslie and Mary Malloy Dimaio in their article, *HIPAA: The Basics*, opined that:

> *Because Maryland has no common law doctor-patient privilege, and a statue governing the confidentiality of medical records only, it has been permissible under Maryland law to interview a party's treating physicians without the party's written authorization. However, Health Insurance Portability and Accountability Act ("HIPAA") regulations apply to oral, written and electronic Protected Health Information ("PHI"). Any physician who is a covered entity ("CE") is prohibited by these regulations from disclosing PHI absent a HIPAA-compliant authorization (or appropriate subpoena or court order). The question arises whether attorneys can now request informal interviews with physicians when the physicians are not educated about HIPAA and its implications.*
>
> *Maryland Rule of Professional Conduct 4.4 and its Comment prohibit using the legal process in a way known to violate a person's rights. Since HIPAA creates protections for privacy in an individual's PHI, interviewing a patient's physician without authorization would appear to violate the patient's privacy rights, and thereby run afoul of Rule 4.4.*
>
> *In addition, Rule 4.1(a)(1) prohibits a lawyer from making a false statement of law or fact when dealing with third persons. The Comment indicates that a misstatement can occur by a failure to act, which may be construed as an affirmative duty to inform a physician that speaking about a patient's PHI without authorization is a violation of HIPAA. See also Rule 8.4 (professional misconduct to engage in conduct involving misrepresentation or deceit).*
>
> *In light of the Privacy Rule, it is advisable to avoid informal interviews of treating physicians on the subject of a patient's PHI absent the appropriate written authorization.*

Recently, Barbara McClellan Stanley faced this same issue in the matter of *Suzette Dineen v. Frederick Memorial Hospital*, a medical malpractice action pending in the Circuit Court for Frederick County. In that case, both the mother, individually, and the parents on behalf of their infant child alleged personal injuries arising out of the pregnancy and premature birth of the infant. Representing the Hospital, Ms. Stanley wanted the opportunity to discuss both patients' medical conditions with their respective treating physicians.

Relying on Magistrate Judge Charles B. Day's opinion in *Law v. Zuckerman*, 2004 WL 438327 (D. Md. Feb. 27, 2004), Ms. Stanley sought a Court Order and Qualified Protective Order authorizing the health care providers as identified in the Court Order "to use or disclose protected health information without the written consent of the plaintiff/patient and/or without further opportunity for the plaintiff/patient to agree or object to the use or disclosure of protected information" and that such communication was in accordance with and protected by HIPAA. Conrad W. Varner and Frederick Goundry, Varner and Goundry, P.A., joined in the Motion.

In *Law*, also a medical malpractice case, the federal trial court addressed whether defense counsel's ex parte discussions with a treating physician—which is allowed under Maryland state law (Maryland Confidentiality of Medical Records Act, Md. Health—Gen. Code Ann. § 4-306(b)(3) ("MCMRA"))—governed the case and not HIPAA. Initially, the court ruled such ex parte communication did not violate HIPAA. The court then reconsidered and reasoned in a fourteen-page opinion that HIPAA would govern unless state law was "more stringent," which is defined to include giving patients more control over their medical records. The court found that state law was not "more stringent" than HIPAA, so ex parte communications are governed by HIPAA (42 U.S.C. § 132(d) et seq. and 45 C.F.R. § 164.512(e)(1)(i)), instead of state law. Accordingly, the court found that unless the patient consents, physicians need a court order or HIPPA-compliant trial or deposition subpoena with satisfactory assurances that the patient has been notified and given the opportunity to object or reasonable efforts have been made to obtain a qualified protective order. In addition to Law, Defendants relied on *Crenshaw v. Monty Life Insurance Co.*, 2004 WL 1149351 (S.D. Cal. Apr. 17, 2004); and the unreported opinion in In *Re PPA Litigation*, 2004 WL 2203734 (N.J. Super. Ct, Sept. 23, 2004) to support the issuance of the Order.

At a hearing on the Motion before the Honorable Theresa M. Adams, Plaintiffs opposed the Motion arguing, among other things, that a Court Order could not adequately protect the privacy of the Plaintiffs. Plaintiffs cited *Crenshaw v. Monty Life Insurance Co.*, 318 F. Supp. 2d. 1015 (S.D. Cal. 2004) for the proposition that only formal discovery, such as depositions are permitted under HIPAA. In *Crenshaw*, however, the Southern District of California held that a court order had not been obtained before ex parte communications were conducted:

> *Although the parties in this case entered into a protective order, it only protects confidential information of Defendant. . . . Because there is no language in the Order, or anywhere else, which provides similar protection to Crenshaw, the Protective Order does not satisfy the*

Continued on page 6

(HIPAA) *Continued from page 5*

requirements of HIPAA. . . . Defense counsel's ex parte communication with Dr. Harris does not fall within HIPAA's requirement that confidential medical information be disclosed pursuant to a court order, subpoena, or discovery request. 318 F. Supp. 2d at 1029.

Plaintiffs argued that they should be notified of any informal discussions with treating physicians in order to be present to monitor their privacy in keeping with the holding of *In Re PPA Litigation*. Ms. Stanley responded that, while New Jersey case law requires notice to plaintiffs before informal discovery, Maryland law does not. She further urged that the holding in *In Re PPA Litigation* was that the trial court should look to the state's own law, not HIPAA, when deciding the whether notice to opposing counsel is required:

Nowhere in HIPAA does the issue of ex parte interview with treating physicians, as an informal discovery device, come into view. The court is aware of no intent by Congress to displace any specific state court rule, statute or case law on ex parte interviews. As for this state's informal discovery practices, Congressional intent seems not to intrude in New Jersey's general authority over its judicial and administrative proceedings. HIPAA under 45 CFR 164.512 (e) allows a covered entity to disclose protected health information without written authorizations of the patient to agree or object to the disclosure during judicial proceedings under certain circumstances such as a court order, discovery request, or subpoena. Id., at 11.

Finally, Plaintiffs expressed the fear that medical care not related to the alleged malpractice would be disclosed in violation of HIPAA. Plaintiffs proposed that discovery depositions would allow Defendants an opportunity to discover the treating physician's knowledge of the matter while protecting Plaintiffs' privacy. Ms. Stanley proffered that the specific treating physicians involved had been identified previously in Plaintiffs' Answers to Interrogatories. Furthermore, the proposed Court Order identified by name those treating physicians protected by the Court Order.

The initial proposed Court Order tracked the language of 45 C.F.R. 164.512(e)(1)(v) and stated as follows:

[R]estricted the use or disclosure of only health information/ medical records relating to any care or treatment of the plaintiff/patient for the injuries suffered at or around the time of the alleged malpractice; permitted any health care provider and/or institution identified in the Order to communicate (orally or in writing) with any attorney for any party in the action pertaining to the care and/or treatment provided to the plaintiff/patient for the injuries suffered at or around the time of the pregnancy, labor and delivery and birth; expressly prohibited use or disclosure of the protected health information for any purpose, other than litigation; and, required the return or destruction of the records at the end of the litigation or proceeding.

The Court ruled in favor of the Defendant. Thereafter, Plaintiffs' counsel wrote to all treating physicians asking, among other things, to be contacted in order to be present at any informal interview. As this letter, in the view of Ms. Stanley, defeated the purpose of the Court's ruling permitting informal interviews, Ms. Stanley submitted an amended order, which included language regarding the purpose of the Court Order:

The purpose of this Court Order and Qualified Protective Order is for any counsel to discuss with the identified health care providers the protected health information of Plaintiff, privately and outside the presence of any other counsel, including counsel for Plaintiff.

The Court's decision regarding the proposed amended order was granted. Even when armed with a Court Order, however, it is ultimately the treating physician's decision whether to engage in informal discussions. Ms. Stanley feels that, until physicians become more educated about HIPAA, defense counsel will continue to face an uphill battle for informal discovery.

The Maryland Defense Counsel would like to make its members aware of the changing law in this area and efforts to be in compliance with state and federal law.

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Ms. Leslie is a partner in the Towson, Maryland firm of Whitney & Bogris, LLP. She concentrates her practice in the defense of general products liability, medical device, pharmaceutical, and medical malpractice matters.

Ms. Dimaio of Maher & Associates in Towson, Maryland focuses her practice on the defense of professional, product, premises and auto liability claims.

Ms. Stanley is a partner at Anderson, Coe & King, LLP. She concentrates her practice in the defense of medical malpractice matters and hospital law.

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Court of Appeals Clarifies Board of Education's Duty to Defend Teachers

BY CHARLES E. WILSON, JR., AMY L. LEONE

In *Montgomery County Board of Education v. Horace Mann Ins. Co.*, Md. 860 A.2d 909 (2004), the Court of Appeals held that, under the Annotated Code of Maryland, a school board was required to defend a teacher accused of sexual and other forms of abuse. The Court's decision clarified that, despite the ambiguity inherent in the applicable statute, a self-insured board of education's duty to defend its teachers is identical to the obligation owed by an insurer who issues a privately available comprehensive liability policy.

Mrs. Barbara Robbins, an eighth-grade teacher with the Montgomery County Public Schools, participated in a county-sponsored mentoring program and was assigned to be a mentor for minor student, John Doe. Their mentoring relationship lasted throughout Doe's tenure at Wood Jr. High and continued into high school. Several years later, Doe filed a complaint against Robbins, accusing her of sexual and other forms of abuse while he was attending Wood Jr. High and beyond. Mrs. Robbins consistently denied the allegations of sexual abuse. The Montgomery County Board of Education (the "Board of Education") refused to provide Mrs. Robbins with a defense to Doe's lawsuit. Horace Mann, which insured Mrs. Robbins under an Educator's Employment Liability Policy that it issued to the Maryland State Teachers Association, defended Mrs. Robbins. The claim was settled for $15,000. Horace Mann then filed a declaratory action against the Montgomery County Board of Education, seeking reimbursement for the costs of defense and settlement.

The Court of Appeals decided that the Board of Education had wrongfully refused to defend Mrs. Robbins, focusing on sections 4-104 and 4-105 of the Education Article. Section 4-1 05(a) requires county boards of education to carry comprehensive liability insurance to protect the board and its agents and employees. Section 4-1 05(c) allows a county board to comply with the statutory requirement through self-insurance so long as it meets several general requirements, including that the terms and conditions are subject to approval by the Insurance Commissioner and they "conform with the terms and conditions of comprehensive liability insurance policies in the private market." The *key* provision here, as noted by the Court of Appeals, is that the terms must conform with the terms and conditions of privately available liability insurance policies.

The Court of Appeals explained that Section 4-105 requires county boards to carry comprehensive liability insurance in a minimum amount of $100,000 per occurrence to protect its employees. An integral part of liability insurance is the duty to defend when there is a potentiality of coverage, the duty to defend is implicit under Section 4-105.

Section 4-105 must be read in conjunction with section 4-104. Section 4-1 04(d)(1) which provides, in relevant part:

> *In any suit or claim brought against a [teacher] by a parent or other claimant with respect to an action taken by the [teacher], the board shall provide counsel for that individual if:*
>
> *(i) The action was taken in the performance of his duties, within the scope of his employment, and without malice; and*
>
> *(ii) The board determines that he was acting within his authorized capacity in the incident.*

The Board of Education argued that Section 4-104(d)(1) established two separate hurdles that a teacher would have to overcome in order to be entitled to a defense. First, a teacher must show that the action complained of *was actually* taken in the performance of his duties, was within the scope of his employment, and was without malice. Second, the teacher must also "seek the Board's determination that she was acting in an authorized capacity in the incident." The Board argued that the statute empowered the Board to use its own discretion, in making the ultimate decision whether to provide a defense.

The Court of Appeals held that these provisions created an ambiguity. That is, if the first "test" in section 4-104(d)(1)(i) is satisfied, the Board *could not* properly conclude under section 4-104(d)(1)(ii) that the employee was *not* acting in an authorized capacity. The Court characterized Section 4-104(d) as "quintessentially remedial legislation" enacted for the benefit of school employees. As remedial legislation, it held that the statute was to be "liberally construed to effectuate its beneficent purpose" and read in harmony with Section 4-105. Since Section 4-105 provides a duty to defend when there is a potentiality of coverage, the Court explained that it would be wholly inconsistent with well established case law regarding the duty to defend to construe section 4-1 04(d) as allowing a board to make its own unreviewable decision as to whether a potentiality of coverage exists. The Court explained that section 4-104(d) was enacted to make *explicit* the duty to defend that was *implicit* in section 4-105. Thus, section 4-104 could not be interpreted as providing that the board does not have to provide a defense when, under the well-established duty to defend case law, it would have such a duty.

Thus, the Court specifically held that there is "only one" test that teachers must pass in order to be entitled to a defense provided by the board. That is, is there a *potentiality* that the conduct at issue was undertaken in the performance of the teacher's duties, within the scope of employment, and without malice. This is an *objective* test to be applied by the board, the county attorney, the interagency panel, and, ultimately, the court.

The Court went on to review the allegations in the Doe complaint and the relevant extrinsic evidence. Although, as the Court explained, the "gravamen" of the allegations in certain Counts was the alleged sexual abuse, Doe also claimed that Mrs. Robbins "abused her special relationship with Doe in numerous inappropriate ways." Specifically, he complained *inter alia* that she called him, bought him gifts, sent food to his home, wrote him love letters, and pro-

Continued on page 8

Maryland Court of Appeals' Reverses $2.5 Million Award Based on Improper References to Race During Trial

By Michael J. Sepanik-Carr Maloney, P.C.

In a recent decision, *Tierco Maryland, Inc. v. Linda Williams, et al.*,[1] the Court of Appeals reversed an award of $1 million in compensatory damages and $1.5 million in punitive damages in a case brought by several patrons of a theme park alleging assault, battery, false imprisonment, and negligent supervision.

The case stemmed from a fracas that ensued after theme park employees denied four-year-old Shaniqua Smith access to a log flume ride on the basis that she did not meet the ride's forty-six inch minimum height requirement. Shaniqua Smith's family members and associates, whom are African American, took issue with the theme park's policy, and refused to leave the ride unless Shaniqua was permitted to accompany them. Certain of the members of the group alleged that prior to boarding the ride, they had seen "white children" who were smaller than Shaniqua permitted on the ride.[2]

A standoff ensued, which soon turned violent, with allegations of punches thrown by one of the plaintiffs and alleged excessive force used by security personnel to subdue the scene and handcuff several of the plaintiffs. The Plaintiff's were then allegedly forced to walk approximately one thousand feet to the park security office.[3] The plaintiffs then allegedly sat in the security office for an hour, during which time, theme park personnel issued them "trespass letters," informing them they were no longer welcome on park property.[4] Upon arrival of the Prince George's County Police Department, the plaintiffs' handcuffs were removed and they were escorted to the park gate and released.[5]

Upon release, the plaintiffs drove to a local hospital where examination by physicians revealed only superficial cuts and bruises, as well as handcuff-induced swollen wrists, but no fractured bones or permanent injuries.[6] Aside from the injuries described above, plaintiffs' sought recovery for embarrassment, public humiliation and upset feelings.[7]

A Prince George's County jury awarded the plaintiffs' a total verdict of $2.5 million. The compensatory damage award of $1,000,000 was awarded in the following fashion: $250,000 in compensatory damages to Charles Smith, $250,000 to Shaniqua Smith, $200,000 to Katrina Smith, $200,000 to Linda Williams, and $100,000 to Frances Williams. The jury also assessed $1.5 million in punitive damages against the theme park. The punitive damage award was vacated by the trial judge on the basis that the evidence offered at trial did not support a finding of malice, however the Court of Special Appeals reinstated the punitive damage award and affirmed the compensatory damage award.

The Maryland Court of Appeals reversed the judgment and remanded the action to the Circuit Court for Prince George's County for a new trial. The Court of Appeals found that although the Complaint contained no allegations of racial discrimination, race became a major focus of the trial.[8] The Court of Appeals took special note that the issue of race, or a particular race, was mentioned sixty-three times during the three-day trial.[9] In addition to several witnesses testifying regarding issues of race, counsel for plaintiff injected race as an issue in his opening argument by stating: "[T]hey had questioned the fact that Shaniqua was one of the only children singled out, and they had seen younger, smaller, whiter children get on the boat. Smaller, whiter children get on the boat, and had not been stopped."[10]

The Court of Appeals reversed the judgment due to the improper focus on the issue of race where race was not relevant to prove any element of the theories of recovery pled by the plaintiffs.[11] The Court of Appeals held that the gratuitous and repeated references to race, and the strong reactions of the jury to the race-tinged testimony, caused such prejudice to the owners of the theme park that they were denied a fair trial.[12] The Court of Appeals also noted that the excessive verdict in light of the *de minimus* injuries led to the conclusion that the verdict was the product of the jury's inflamed prejudice and passion.

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[1] 381 Md. 378, 849 A.2d 504 (2004).
[2] *Id.* at 382.
[3] *Id.* at 383.
[4] *Id.* at 383.
[5] *Id.* at 383.
[6] *Id.* at 384.
[7] One of the plaintiffs, a nurse, also claimed two days worth of lost wages.
[8] *Id.* at 384.
[9] *Id.* at 384.
[10] *Id.* at 404.

(COURT OF APPEALS) *Continued from page 7*

vided him with transportation. Doe also added that Mrs. Robbins "intentionally and inappropriately interfered with his parents and guardians by inappropriately blending and confusing the roles of mentor, teacher, lover, friend and parent" and that, as a result of her wrongful acts, he suffered severe mental and emotional distress and economic and psychic damages. Despite the complaint's focus on sexual abuse, the Court of Appeals explained that Doe's allegations of injury as a result of Robbins' "actions and/or omissions" potentially included the alleged non-sexual conduct. As such, the Board, under the relevant statutes, was required to defend Mrs. Robbins for the entire action.

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(HIGH CRIMES OR MISDEMEANORS) *Continued from front cover*

(citing *Valentine v. On Target, Inc.*, 353 Md. 544, 549, 727 A.2d 947, 949 (1999)). Under Maryland law, business patrons are considered "business invitees."[3] It is a well-settled principle of Maryland law that the duty of a business to a business invitee or patron is that of "exercising reasonable care to see that the premises upon which he is invited are reasonably safe." *Eyerly v. Baker*, 168 Md.599, 178 A. 691, 694 (1935); *see also Nigido v. First Nat'l Bank of Baltimore*, 264 Md. 702, 704, 288 A.2d 127, 128 (1972); *and Jackson*, 128 F. Supp. 2d at 311.

A person generally has no duty to control the actions of a third party in order to prevent injury to another in the absence of a "special relationship" between that person and the injured party or between that person and the third party. *See* RESTATEMENT (SECOND) OF TORTS § 315 (1965). Similarly, a person whose action is necessary to aid or protect an injured party is ordinarily, whether aware of the injury or not, under no duty to take such action regardless of the severity of the danger or injury or the trivial nature of the required action. *See* RESTATEMENT (SECOND) OF TORTS § 314; *see also Southland Corp. v. Griffith*, 332 Md. 704, 716, 633 A.2d 84, 90 (1993). A duty to act in either situation may only be created by statute or by a "legally cognizable special relationship."

Maryland courts have found that such a special relationship exists between a business and a patron where the business is aware that the patron is being harmed by a third party. In *Southland*, the Court of Appeals confronted the issue whether a business or its employees have an affirmative legal duty to aid a business invitee they know to have been endangered and injured on the premises. 332 Md. at 707, 633 A.2d at 85. *Southland* involved an off-duty police officer that was assaulted in the parking lot of a convenience store. The officer alleged that the store clerk was aware of the ongoing assault but initially refused to call the police. The court noted that a special duty to aid an injured business invitee could only be predicated upon a finding of a special relationship between the business and the business invitee. The court held that "an employee of a business has a legal duty to take affirmative action for the aid or protection of a business invitee who is in danger while on the business's premises, provided that the employee has knowledge of the injured invitee and the employee is not in the path of danger." *Southland*, 332 Md. at 717, 633 A.2d at 91.

{ Maryland business owners, for the most part, cannot be held liable for failure to protect patrons from third party criminal acts—at least when an unforeseeable crime is at issue. The potential for such liability does exist, however, where it can be shown that the criminal act was foreseeable. }

Courts have declined to extend that special relationship and consequent legal duty, however, to situations that would require businesses "to protect their customers from unforeseen acts of third parties." *Bias v. IPC Int'l Corp.*, 1997 WL 100925, 7 (4th Cir. 1997) (unpublished slip opinion). The more difficult question is what circumstances will render crimes "foreseeable," and whether a duty exists to protect a patron from those crimes.

II. Potential Liability where Circumstances Render the Crime Foreseeable

Maryland business owners, for the most part, cannot be held liable for failure to protect patrons from third party criminal acts—at least when an unforeseeable crime is at issue. The potential for such liability does exist, however, where it can be shown that the criminal act was foreseeable.

Although it involves the duty of a landlord to a tenant rather than that of a business to a business invitee, *Scott v. Watson*, 278 Md. 160, 359 A.2d 548 (1976), is the seminal case on the duty of a business to secure the premises, and, therefore, the safety of the business invitee, from the danger of the criminal activity of third parties. *See Moore v. Jimel, Inc.*, 147 Md. App. 336, 344, 809 A.2d 10, 14 (2002) (reasoning that although the Court of Appeals determined the duty of a landlord in Scott, the same duty would apply to a shopkeeper).[4] In *Scott*, the Court of Appeals determined whether Maryland law imposes upon the landlord a duty to tenants to protect them from third party criminal acts committed in common areas within the landlord's control and held that "there is no special duty imposed upon a landlord to protect his tenants against crimes perpetrated by third parties on the landlord's premises." In so holding, the court relied upon its decision in *Nigido* and *Eyerly* in the context of a business's duties to business invitees.

In *Nigido*, the court upheld the dismissal of a bank customer's negligence claim against the bank for failure to protect him from injuries sustained when he was shot in the course of a bank robbery. The court found that the customer was not owed a "special duty" but rather "the same duty as a shopkeeper owes his customer, i.e., to use reasonable care for his protection." *Nigido*, 264 Md. at 704, 288 A.2d at 128. In *Eyerly*, the court held that "one who invites another upon his premises, owes to the invitee the duty of exercising reasonable care to see that the premises upon which he is invited are reasonably safe." 168 Md. 599, 178 A. at 694. The *Scott* court held, therefore, that although the general rule requiring reasonable care is typically applied to defects in the premises, "the rule encompasses within its general ambit injuries sustained by tenants as a result of criminal acts committed by others in the common areas within the landlord's control." 278 Md. at 165-66, 359 A.2d at 552. Absent additional circumstances, that duty of reasonable care would not include a duty to protect patrons against third party criminal acts.

The *Scott* court further examined whether a duty should be imposed if the landlord has knowledge of increasing criminal activity on the premises or in the immediate neighborhood and again held that the reasonable care standard applied. Reasoning that "[t]he duty of a landlord to exercise rea-

Continued on page 10

[3] *"A business invitee is 'one invited or permitted to enter another's property for purposes related to the landowner's business." Jackson, 128 F. Supp. 2d at 311 (quoting* Tennant v. Shoppers Food Warehouse Md. Corp., *115 Md. App. 381, 387-88, 693 A.2d 370, 374 (1997)).*

[4] *Maryland courts are not alone in drawing analogies from landlord-tenant law to determine the duty of businesses to business invitees.* See *Laura D. Kulwicki*, A Landowner's Duty to Guard Against Criminal Attack: Foreseeability and the Prior Similar Incidents Rule, *48 OHIO ST. L. J. 247, 250 (1987).*

(HIGH CRIMES OR MISDEMEANORS) *Continued from page 9*

The comments to section 344 make clear that businesses are under no duty to protect against third party criminal acts unless and until the business has knowledge, whether actual or constructive, that the criminal acts are likely to occur if safeguards are not implemented. ■

sonable care for the safety of his tenants in common areas under his control is sufficiently flexible to be applied to cases involving criminal activity without making the landlord an insurer of his tenant's safety," the court held that "[i]f the landlord knows, or should know, of criminal activity against persons or property in the common area, he has a duty to take reasonable measures, in view of the existing circumstances, to eliminate the conditions contributing to the criminal activity." The court specifically limited the relevance of past criminal activity to that which occurred on the premises. Past crimes in the immediate neighborhood would not operate to impose a duty to guard against the dangers posed by such crime.

The higher duty created in *Scott* where the landlord has knowledge of past criminal activity on the premises is similar to that imposed on businesses under the section 344 of the Restatement (Second) of Torts, which states:

> *A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals,and by the failure of the possessor to exercise reasonable care to*
>
> *(a) discover that such acts are being done or are likely to be done, or*
>
> *(b) give warning adequate to enable the visitors to avoid the harm, or otherwise protect against it.*

RESTATEMENT (SECOND) OF TORTS § 344.

The comments to section 344 make clear that businesses are under no duty to protect against third party criminal acts unless and until the business has knowledge, whether actual or constructive, that the criminal acts are likely to occur if safeguards are not implemented. RESTATEMENT (SECOND) OF TORTS § 344. cmt. f. Unlike section 344, the *Scott* decision limits the circumstances giving rise to a duty to protect from injuries resulting from third party criminal acts to the past incidents of crime on the premises.

More recent Maryland decisions in the context of the duty owed to business invitees have relied on *Scott* and have similarly limited the foreseeability inquiry to criminal acts on the premises. *See Tucker v. KFC Nat'l Mgmt. Co.* 689 F. Supp. 560 (D. Md. 1988) (holding that although the plaintiff introduced some evidence of criminal activity in the restaurant and the community, no evidence before the court indicated that the restaurant knew or should have known to "anticipate the particular incident that caused the plaintiff's injury," and, therefore, the restaurant owed no duty); *Bias v. IPC Int'l Corp.*, 1997 WL 100925, 7 (4th Cir. 1997) (unpublished slip opinion) (declining to extend the special relationship and duty to require businesses "to protect their customers from unforeseen acts of third parties"); *Jackson v. A.M.F. Bowling Ctrs., Inc.*, 128 F. Supp. 2d 307, 311 (D. Md. 2001) (holding that a bowling alley did not owe a duty to prevent the stabbing at a dance on its premises because although the plaintiff had introduced evidence of small fights during past events, the evidence did not provide the bowling alley with actual or constructive notice "that a fight, let alone one involving a dangerous weapon, would have occurred").

Most recently, in *Moore v. Jimel, Inc.*, 147 Md. App. 336, 344, 809 A.2d 10, 14 (2002), the Court of Special Appeals affirmed summary judgment against a negligence suit by a restaurant patron who was attacked and raped in the restaurant restroom. The court noted that there is no special relationship between a business and a business invitee that would give rise to a "special duty" to protect against potential criminal attacks by third parties. The court recognized, however, that such a special duty may be created if a business knows, or should know, of past criminal activity on the premises. If the business possesses such knowledge "he then has a duty to take reasonable measures, in view of the existing circumstances, to eliminate the conditions contributing to the criminal activity." *Moore*, 147 Md. App. at 344, 809 A.2d at 14 (internal citations omitted). The court found no history of past crimes on the premises sufficient to create such a special duty.

Although none of the cases discussed above hold the business owner liable, each recognizes the potential for such liability where the crime and injury was foreseeable. Courts will examine the history of criminal activity on the premises in determining whether such foreseeability exists. Logically, the extent to which past crimes on the premises are similar in kind and severity to the crime that injured the patron, and how frequently and recently those crimes occurred, will be prime factors in the foreseeability determination.

It is critical from a risk management perspective, therefore, for Maryland businesses to adequately document and address all criminal activity on their premises in such a way that it can later demonstrate that it responded adequately to previous issues or be able distinguish the previous issues from current issues to defeat a foreseeability argument. Although documenting these

Continued on page 11

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(HIGH CRIMES OR MISDEMEANORS) *From page 10*

issues and responding properly to the issues as they arise is paramount to protecting Maryland businesses from increased liability, taking action to address these issues subjects these businesses to another potential crisis—providing additional security in an inefficient or ineffective manner rather than no security at all may *still* subject the business to increased liability. Accordingly, under certain circumstances doing too much is still not enough.

III. Potential Pitfall: The Risk of Providing Security

As if the potential liability for failure to employ security measures to protect patrons from third party criminal acts were not burdensome enough for Maryland businesses, improper performance of security, whether required or voluntary, may render the business liable for negligence. Indeed, Maryland courts have clearly opened the door to liability where a business voluntarily undertakes to protect its patrons, but does so improperly. In *Nigido*, the Court of Appeals noted that a bank's decision not to employ armed guards "might very well reflect the exercise of sound judgment rather than negligence." *Nigido*, 264 Md. at 706, 288 A.2d at 129. Similarly, in *Scott*, the court held that even if no duty existed to employ the particular level of security measures provided by defendants, improper performance of such a voluntary act could in particular circumstances constitute a breach of duty.

IV. Conclusion: A Balancing Act

Ultimately, businesses face conflicting sources of potential liability in determining the level of security to provide. On one hand, failure to provide enough security to counter foreseeable harm as a result of criminal acts of third parties may render the business liable for those harms. On the other hand, the provision of security measures in excess of what the law requires opens the business up to liability if the measures are not properly performed. For these reasons it is essential that a business determine, as quickly as possible, the extent of its potential duty to provide security and avoid providing excess security measures that merely increase the potential for liability if performed improperly.

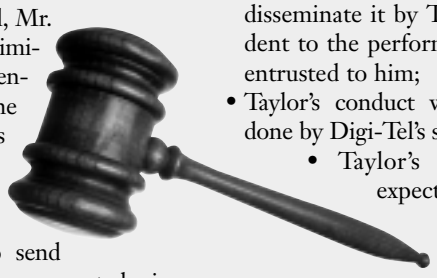
RECENT DECISIONS

January 2005 Case Summaries and Comments

Felland Limited Partnership v. DIGI-TEL Communications. LLC, 2004 Md. Lexis 797 (Md. 2004). OPINION BY: JUDGE ELDRIDGE, NOW RETIRED.

Judge Eldridge wrote the opinion for the Court of Appeals in this case. The Court affirmed summary judgment rendered by the trial court and affirmed an unreported opinion by the Court of Special Appeals.

Felland Limited Partnership ("Felland") brought a private action under the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA"), against Digi-Tel Communications, LLC ("Digi-Tel") based on acts of John Taylor, a salesperson employed by Digi-Tel. Without consulting anyone at Digi-Tel, Mr. Taylor had hired a facsimile company to fax potential customers about the telephone products that he was selling for Digi-Tel. Mr. Taylor personally paid the facsimile company to send out these flyers. He never requested reimbursement from Digi-Tel nor did he ever tell anyone at Digi-Tel what he was doing with this outside facsimile company. Felland, a competitor of Digi-Tel, discovered this activity when it was informed by its own customers that they were receiving these faxed solicitations.



For purposes of its opinion in this case, the court applied Maryland principles on scope of employment.

The opinion begins by recognizing two recent decisions which clarify that Maryland trial courts do have jurisdiction over suits for damages under the Telephone Consumer Protection Act, 47 U.S.C. §227(b). *Ponte v. Investors' Alert*, 382 Md. 689, 857 A.2d 1 (2004); *Levitt v Fax. Com*, 383 Md. 141,857 A.2d 1089 (2004).

Judge Eldridge relied on the following observations about the evidence on scope of employment before the trial court:

- Taylor's specific conduct was unauthorized;
- Lack of authority extended beyond the creation and broadcast of the facsimile advertisements;
- Taylor's duties did not include creating or placing advertisement for Digi-Tel;
- Taylor did not have authority to enter into contracts on Digi-Tel's behalf—Digi-Tel used advertisement materials created by Nextel for whom it distributed telephone equipment;
- Placing of advertisements even by Digi-Tel's marketing director required approval by one of three Digi-Tel officers;
- Creation of advertisement material and the engagement of a company to disseminate it by Taylor was not incident to the performance of the duties entrusted to him;
- Taylor's conduct was not commonly done by Digi-Tel's sales representatives;
- Taylor's conduct was not expectable or foreseeable by the employer

The court found that these facts do not support a claim for vicarious liability. In section III of the opinion, useful principles worthy of review are repeated from several recent opinions of the Court regarding whether or not an employee has acted within the scope of employment and created vicarious liability for the employer.

Comment

The claim in the above case has potential insurance implications. The issue whether there is coverage for blast fax claims under Commercial General Liability (CGL) insurance policies is the subject of conflicting decisions.

The first federal circuit court opinion was published at the end of last year in *American States Ins. Co. v. Capital Associates of Jackson County*, 329 F.3d 939 (7th Cir. 2004). The Seventh Circuit reversed the District Court's

Continued on page 12

RECENT DECISIONS—CONTINUED

finding that the insurer had a duty to defend and found that regardless of whether a blast fax does or does not involve an invasion of privacy, it does not constitute an advertising injury and trigger coverage under Coverage B.

The majority of state and federal district court opinions have found coverage under either Coverage B or under Coverage A of the CGL policy. The United States District Court for the Eastern District of Virginia held in *Resource Bancshares Corp. v. St. Paul Mercury Ins. Co.*, 323 F. Supp. 2d 709 (2004), that an insurer has a duty to defend and indemnify its insured in a case brought under the TCPA alleging violation of plaintiffs' privacy by faxing unsolicited ads. An appeal to the Fourth Circuit is pending.

The Insurance Services Office has a new endorsement to preclude coverage for Telephone Consumer Protection Act claims and other blast fax claims.

Nationwide Mutual Insurance Company v. Gail Anderson. Individually. etc., 2004 Md. App. Lexis 191 (2005). OPINION BY: JUDGE DAVIS

In this opinion by Judge Davis, the panel reversed the trial court's denial of appellant's Motion for Judgment Notwithstanding Verdict and remands the case. The basis for reversal was the trial court's error in submitting last clear chance to the jury. The evidence produced at trial did not present a last clear chance case.

The analysis focused on whether or not Clyburne, a passenger in his own vehicle at the time of the accident, had an opportunity subsequent to the negligence of the vehicle's driver, Jones, to act to avoid the accident. Jones' negligence consisted of driving without a license and driving while intoxicated. Her (contributory) negligence is incontrovertible. Clyburne's negligence was in giving the keys to the car to Jones and permitting her to drive. The negligence continued to the time of the collision with the second vehicle.

Judge Davis emphasized the sequential nature of the doctrine of last clear chance. He recited the elements of last clear chance set forth in *Burdette v. Rockville Crain Rental, Inc.*, 130 Md. App. 193, 745 A.2d 457 (2000):

> *The doctrine of last clear chance permits a contributorily negligent plaintiff to recover damages from a negligent defendant if each of the following elements is satisfied: (i) the defendant is negligent; (ii) the plaintiffs contributorily negligent; and (iii) the plaintiff makes "a showing of something new or sequential, which affords the defendant a fresh opportunity (of which he fails to avail himself) to avert the consequences of his original negligence. The theory is that if the defendant has the last clear opportunity to avoid the accident, the plaintiff s negligence is not the proximate cause. The operative phrase is fresh opportunity. Clyburne had no fresh opportunity. This accident results from the concurrent negligence of both defendants. Id. at 216, 745 A.2d 457.*

An interesting observation appears at the end of this opinion: "Moreover, the doctrine of last clear chance is not implicated when the party in control of the instrumentality that causes the injury is the "helpless" party the doctrine is designed to protect."

Lee v. Cline, 2004 Md. Lexis 786 (2005). OPINION BY: JUDGE ELDRIDGE

In this case, the Court of Appeals confronts two issues of qualified immunity of state personnel for tortious acts or omissions under the Maryland Tort Claims Act, §§12-10l et seq. of the State Government Article. Does the Maryland Tort Claims Act grant qualified immunity to state personnel for acts or omissions within the scope of the state employees' public duties when those acts or omissions involve violations of state constitutional rights or intentional torts? The court answered this question in the affirmative. The statutory language plainly appears to cover intentional torts and constitutional torts as long as they were committed within the scope of state employment and without malice or gross negligence.

Judge Eldridge reasoned that the inapplicability of common law qualified immunity in tort suits for public officials performing discretionary acts that involve violations of constitutional rights or intentional torts is not a persuasive analogy. Major differences exist between the policies underlying public official immunity and the policies underlying immunity in the Maryland Tort Claims Act. The purpose of Maryland public official immunity is to encourage the freedom of public officials to make good decisions in performance of important public duties so they have a defense against later claims that they could have made a better decision. This policy applies to negligence counts rather than intentional acts. Immunity under the Maryland Tort Claims Act is broader to insulate state employees generally from tort liability if their actions are within the scope of employment and without malice or gross negligence. The purpose is as applicable to non-malicious intentional torts and constitutional torts as it is to negligence.

Despite the clarification that the immunity under the Maryland Tort Claims Act does extend to constitutional torts and intentional torts as well as negligence acts, the day was not saved for the defendant. While the Court of Special Appeals had held that there was insufficient evidence of malice to generate a triable issue, the Court of Appeals found otherwise. The case was remanded to the Court of Special Appeals with directions to reverse the trial court's judgment and remand the case to the trial court for further proceedings.

Livesay v. Baltimore County, Md. App. Lexis 738 (2004) OPINION BY: JUDGE RAKER

The Court of Special Appeals performed a de novo review of the issues in this appeal of the Baltimore County Circuit Court's entry of summary judgment for three defendants, Baltimore County prison guard, Ricky Fore ("Fore"), Baltimore County Detention Center Classification Supervisor, George Jackson ("Jackson"), and Baltimore County.

The first issue was whether section 5-303(b) of the Maryland Local Governmental Tort Claims Act (LGTCA), Md. Code Ann, Courts & Jud. Proc. § 5-

RECENT DECISIONS—CONTINUED

301 et seq., eliminates immunity defenses for local government employees. That section requires local governments to indemnify employees for torts committed within the scope of employment, and it prevents them from evading this responsibility by asserting immunity. Employees' defenses and their immunities are explicitly preserved in §5-303(d).

The second issue was whether the extension of immunity to officials of a "municipal corporation" in §5-507(b)(1) narrows the coverage of that statute so that immunity does not extend to county employees. The purpose of this statute was to codify existing common law on public official immunity. Under common law, that immunity applied to municipal employees *and* county employees. Despite the seemingly narrower drafting, the legislature must have intended the same rule to continue to apply rather than produce the absurd result that city and county officials are held to a different standard of immunity for the same actions. Whether a municipal official or county official, a public official enjoys immunity while acting as a public official, performing a discretionary rather than ministerial act, and acting without malice. Since at least 1961, Maryland common law has recognized that a correction officer or prison guard is a public official. *Carder v. Steiner*, 225 Md. 271, 170 A.2d 220 (1961).

The third issue was whether Fore's acts in response to plaintiff's suicide attempt were discretionary rather than ministerial. Ministerial duties are those to which nothing is left to discretion. Discretionary duties are those where a public official is authorized to act under the circumstances according to his own judgment and conscience. Fore was acting in a discretionary capacity when he responded to Livesay's suicide attempt. While there were instructions for responses to suicide attempts in both a Baltimore County Operation Manual and in a Baltimore County Lesson Plan, a plain reading showed that an officer retained discretion to select the appropriate response under the particular circumstances.

There was no evidence before the trial court establishing any act or omission by Jackson, so summary judgment on his behalf was proper. Summary judgment was also appropriate for the county. There was no vicarious liability and no duty to indemnify the employees.

Waterman v. Batton., 393 F.3d 471 (2005). OPINION BY: JUDGE WILKINS

Judge Wilkins wrote for the Fourth Circuit panel in this appeal of the federal district court's order denying motions for summary judgment of three defendants based on qualified immunity. The case was reversed and remanded. Judge Hudson joined Judge Wilkins. Judge Motz wrote a dissenting opinion.

The vehicle of the decedent, Waterman, was being pursued by the transit police when he reached the toll plaza for the Harbor Tunnel. Officers waiting there fired initial shots before the vehicle had passed all of the officers. Additional shots were then fired. Before the shooting began, the officers had been advised by one of the pursuing officers that Waterman had attempted to assault him with his car by attempting to run him off the road. The waiting officers were also aware that Waterman had been leading the pursuing officers in a chase for longer than ten minutes, that he was not stopping despite their approach with their weapons drawn, and that he was accelerating in the general direction of two of the officers.

Judge Wilkins emphasized that the panel was accepting the facts as found by the district court but analyzing de novo the question of what a reasonable jury could determine regarding the officers' actions.

The focus of the opinion began with the specific right that the Waterman estate alleged was infringed: the fourth amendment right to be free of unreasonable seizures. This includes seizures accomplished by excessive force. Deadly force is only lawful if the officers have probable cause to believe that the suspect poses a threat of serious physical harm to either the officer or others. For purposes of this appeal, analysis was limited to whether there was a threat of serious physical harm to the officers because the appellants did not argue that their use of deadly force was justified by the threat that Waterman posed to the general public.

The test is one of objective reasonableness, weighing the nature of the intrusion on Waterman against the governmental interest at stake. Qualified immunity exists to protect government officials performing discretionary functions from liability as long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. It protects law officers from being victims of hindsight.

The facts of this case were analyzed in two segments. The first segment comprised of the shots discharged when Waterman was accelerating in the general direction of some of the officers and second segment comprised of the shots fired after Waterman's vehicle had passed all of the officers.

The court had little difficulty with the initial shots. Reasonableness is evaluated from the information possessed by the officers at the moment that the force is applied. When the initial shots were fired the suspect was positioned to seriously injure or kill one or more of the officers with his vehicle. They believed that the suspect had already used his vehicle as a weapon against another officer during the chase. Qualified immunity applied to their action.

The second segment was viewed differently. The court held" ... that force justified at the beginning of the encounter is not justified even seconds later if the justification for the initial force has been eliminated." The record viewed most favorably to the estate showed that the subsequent shots may not have been justified. However, the court went on to explain that the case law in effect at the time of the shooting was not clearly established on whether an officer could apply deadly force in response to a threat moments after it should have been eliminated. Because the law was uncertain, the shooting during the second segment could not be unconstitutional.

SPOTLIGHTS

Richard L. Flax of ZAUNER & FLAX, P.A. in Baltimore and Joshua Wall of COZEN O'CONNOR in Philadelphia prevailed on a motion for summary judgment for Bechtel Corporation in the United States District Court for the District of Maryland. The suit was brought by an individual claiming serious injury from being struck by a golf ball while on a private golf course driving range during a golf outing. See *Martins v. Bechtel Corporation, et al.*, Case No. WMN-03-2109. The plaintiff alleged that Bechtel Corporation was vicariously liable for a golfer's errant shot on the practice range and the advice of his colleague who suggested that the golfer should adjust his grip. In concluding that the plaintiff failed to show even mere negligence on the part of Bechtel Corporation, Judge William M. Nickerson relied on existing authority that "[n]ot every shot by a golfer goes to the point where he intends it to go. If such were the case, every player would be perfect and the whole pleasure of the sport would be lost. It is common knowledge, at least among players, that many bad shots must result although every stroke is delivered with the best possible intention and without any negligence whatever." (citation omitted). The memorandum opinion went on to state, "Despite Plaintiff's skewed characterization of the events, offering another golfer some casual advice or adjusting one's grip in response to that advice does not take one's conduct outside that of a reasonable golfer. Nor can it be the rule, as Plaintiff appears to argue, that it is negligence per se for the occasional 'poor' golfer to use a practice range." The defendant owner/operator of the golf course was also granted summary judgment. The plaintiff has appealed the decision in favor of the golf course owner/operator to the United States Court of Appeals for the Fourth Circuit.

Organizers and Referees of Adult Amateur Sporting Events Have No Duty to Protect Spectators and Participants from Adverse Weather

BY BARRY C. GOLDSTEIN-WARANCH & BROWN, LLC

In *Patton v. USA Rugby, et al.*, the Court of Appeals of Maryland recently held that a "special relationship" does not exist between the organizers and referees of an adult amateur sporting event and the event's participants and spectators; therefore, there is no duty to protect those individuals from adverse weather events.

Appellant, Robert Carson Patton, II, was playing in an amateur rugby tournament in Annapolis on June 17, 2002. His father, Donald Lee Patton, was a spectator. Robert Patton's rugby match was suspended at halftime because of adverse weather conditions. Within minutes after the match was suspended, both Robert Patton and Donald Patton were struck by lightning. Tragically, Robert Patton was injured and Donald Patton died. Robert Patton and family members filed a negligence suit in the Circuit Court for Anne Arundel County alleging that the organizers of the tournament and the referee of Robert Patton's game breached their duty of care by failing to cancel the game earlier.

The organizers and referee filed motions to dismiss arguing that they owed no legal duty to Robert and Donald Patton. The Circuit Court agreed and dismissed the action. The Patton family appealed and the Maryland Court of Appeals, on its own initiative, issued a writ of certiorari to determine whether the Defendant Appellees owed any legal duty to the Pattons.

The Pattons argued that a "special relationship" existed between Robert and Donald Patton and the Appellees. They claimed that the Appellees breached a duty by failing to cancel the rugby game earlier in light of adverse, dangerous weather conditions. The Appellees countered that the Pattons were adults with the ability to observe weather patterns, and that there was no special relationship imposing on Appellees a duty to warn of the dangers associated with lightning.

The Court of Appeals affirmed the dismissal of the case, finding that there was no special relationship between the Appellees and the Pattons. The Court noted that, in previously recognized special relationships (i.e., common carriers, innkeepers, store owners, etc....), one party cedes control to another thereby creating dependence on the controlling party to keep them safe. In the case of the adult amateur rugby match, that there was no evidence that Robert and Donald Patton entrusted themselves to the control and protection of the Appellees; they could have left the playing area at any time. The Court therefore found that there was no special relationship and thus, no duty owed by the Appellees to warn the Pattons of the effects of adverse weather conditions—lightning. In a footnote, the Court cautioned that in situations with children participating in athletic events, there may be a higher degree of dependency and control and therefore a special relationship might arise, imposing legal duties and possible liability on the organizers of such events.

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A Publication from The Maryland Defense Counsel
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Lutherville, MD 21094

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