THE DEFENSE LINE

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Important Announcements

Mark your calendars now for The **ASTAR Project** November 15, 2006 3:00 p.m.

See page 14 or mddefensecounsel.org for details

Supervening Cause is Alive and Well

By John T. Sly, Esq. and David Mandell

"It is a general rule that a negligent actor is liable not only for harm that he directly causes but also for any additional harm resulting from normal efforts of third persons in rendering aid, irrespective of whether such acts are done in a proper or a negligent manner." *Morgan v. Cohen*, 309 Md. 304, 311, 532 A.2d 1003, 1005–06 (1987). This statement by the Court of Appeals in *Morgan* generally endorsed the notion that the negligent medical treatment of an individual is a separate tort for which the original tortfeasor is jointly liable. *Id.* at 1006.

The *Morgan* court was presented with the question of whether a plaintiff's agreement to release all claims against an allegedly negligent motorist also released the plaintiff's treating physician, who allegedly provided negligent care. *Id.* at 1004. The court held that where the plaintiff releases claims against the original tortfeasor, Maryland law does not bar suit against a physician who is a subsequent tortfeasor subject to a separate cause of action. Id. at 1008-09. The court remanded the proceedings for the determination as to whether the ambiguous language of the releases was intended to block claims against the physician. *Id.* at 1011.

Taken literally, the court's discussion of joint tortfeasor liability in *Morgan* would seem to have precluded the application of supervening cause —particularly in the context of medical malpractice. However, a recent unreported decision of the Court of Special Appeals in *Rankin v. University of Maryland Medical System Corp.*, No. 1828 (Md. Spec. App. March 28, 2006) reveals that the concept of supervening cause is alive and well in Maryland, given the right facts.

The burden of proof in a medical malpractice case in Maryland requires the plaintiff to show: (1) a lack of the requisite skill or care on the part of the health care provider, and (2) that the missing skill or care was a direct cause of the injury. *Suburban Hospital Ass'n v. Mewhinney*, 230 Md. 480, 484-485, 187 A.2d 671 (1963). If "proof of either of these is wanting, the case is not a proper one for submission to the jury." *Id; see also Lane v. Calvert* 215 Md. 457, 462, 138 A.2d 902 (1958).

"Because of the complex nature of medical malpractice cases, . . . [the patient/plaintiff must present expert testimony] to establish [both] breach of the standard of care and causation." *Stickley v. Chisholm*, 136 Md. App. 305, 313, 765 A.2d 662 (2001), *citing*, *Jacobs v. Flynn*, 131 Md. App. 342, 354, 749 A.2d 174 (2000). On the issue of whether the negligence of a health care provider was a "cause" of the patient's injuries, the doctrines of "proximate" cause, "supervening" cause, and "legal" cause are applied the same in a medical malpractice action as they would be applied in any other negligence action.

A "causal connection" between a defendant's alleged negligence and the plaintiff's injuries can be "extinguished by the passage of time, and direct proof is necessary to re-illumine the relationship." *Peterson v. Underwood*, 258 Md. 9, 19, 264 A.2d 851 (1970). "Thus, although an injury might not have occurred 'but for' an antecedent act of the defendant, liability may not be imposed if . . . the negligence of another is the moving and effective cause of the injury, or if the injury is so remote in time and space from defendant's original negligence that another's negligence intervenes." *Id.* at 16.

Foreseeability also plays a fundamental role in determining whether a cause in fact will be con-

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President's Message

It is with tremendous pleasure that I write this first President's Message after being elected as Maryland Defense Counsel President at our June annual meeting. Over the past five years, the MDC has become more vibrant, vital to our community and members, and even more involved with the Bench, Bar, legal community and before our legislators in Annapolis. In 2006–07, the MDC Officers and Board are renewing our commitment of service and dedication to our constituency with several new initiatives, in addition to the activities and services we have provided over the years.

I am honored to serve with President-Elect, Dan Moylan, Secretary, Kathleen Bustraan, Treasurer, Bud Brown, and immediate Past-President, Sky Woodward, as the 2006–07 MDC Officers. Please do not hesitate to contact me or, indeed, any of the Officers if you would like to discuss MDC business or to simply get involved in the business of the MDC. We welcome your involvement in YOUR MDC!

Joseph M. Jagielski, Esquire

Law Offices of Joseph M. Jagielski

The Officers, Board, Executive Director, Kathleen Shemer, and I participated in a Strategic Planning Retreat in Taneytown on Friday, September 8, 2006. This retreat was a considerable success, and you can anticipate hearing more about it from us throughout the coming year as we review and enhance the MDC's overall communication strategy, our own organization, and opportunities for furthering our constituent and member services.

The retreat was an eye opening and exhilarating experience. As with any strategic planning session, it was essential for us to see where we are and to plan where we need to go. As we did so, we had a tremendous opportunity to review the services that the MDC provides to its members. Specifically, we were able to actually "put on the board" a comprehensive list of the multitude of services that an MDC member gets for his/her dues and which make MDC membership such a great value. Of course, as an MDC member these services should be no surprise to you. What we did discover, however, was that we have additional opportunities to communicate what the MDC is doing for its members. Please accept this as what I hope will be the beginning of a long and constructive dialogue throughout the 2006–07 Term and beyond.

Member Services

What does the MDC provide to its members? I would expect that many members reading this Message have already used the MDC email system, which enables us to communicate across the membership. Members can solicit information regarding expert witnesses and transcripts, in addition to many other pieces of jurisdiction specific information essential to a successful legal practice. The MDC has been fortunate enough to participate in several amicus curiae briefs and presented six educational programs last Term, including an intimate dinner with Court of Special Appeals Judge Timothy Meredith. The MDC communicates throughout the year, via *The Defense Line*, as well as email blasts. MDC members continue to have the opportunity to interview prospective judicial candidates at the Circuit Court, Court of Special Appeals and Court of Appeals level. Our goal to promote a highly qualified, experienced and diverse bench continues, and we have had the tremendous fortune to have several of our members appointed by the Governor to serve on the Judiciary and on the Maryland Workers' Compensation Commission. In addition to the MDC's involvement with judicial selections, we have worked intimately with the Sitting Judges in the 2006 election process.

Through the able leadership of Gardner Duvall, Mark Coulson, Chris Boucher, Ileen Ticer and Nancy Harrison, and with the incredible support of our lobbyist, John Stierhoff, the MDC has increased its visibility during the legislative session in Annapolis. Each year, the MDC hosts a dinner for members of the Senate Judiciary and House Judicial Proceedings Committees, two committees where legislation that is important to our practices and clients is considered. The MDC has both promoted and sought sponsorship for legislation to provide solutions to our clients' problems and advocate justice and opposed legislation that would have a negative impact on our practices and representation of our clients before the courts and administrative bodies throughout Maryland. At our programs and events, our members have an opportunity to meet commissioners and judges outside of the courtroom. The MDC provides opportunities for our members to network with each other at events like Brown Bags, involvement with the Defense Research Institute (DRI) and leadership opportunities at the Bar. In 2005–06, we undertook a very successful sponsorship initiative. Finally, the MDC hosts two social events annually, the upcoming Past Presidents Reception and our Annual Meeting in June.

Of course, any organization that rests on its laurels is doomed to fail. In 2006–07, we expect the MDC to be providing even greater opportunities for constituency and member service. In our dialogue together, we will be seeking out what we can do to further the MDC in your lives and practices, and then we will take advantage of the strength and talent of the MDC to meet and exceed those needs.

2006–07 Board

MDC's legislative agenda again will be spearheaded by Gardner Duvall as our Legislative Branch Liaison, Mark Coulson, Chris Boucher and Laura Cellucci as our Legislative Co-Chairs, and Nancy Harrison and Ileen Ticer as our Workers' Compensation Substantive Law Committee Co-Chairs. Don't be surprised to receive communication from them regarding what is going on in Annapolis, how you, as an MDC member, can help, and what happened at our State's Capital. Also, don't be surprised to hear from our other Substantive Law Committee Chairs, Chris Heffernan, Construction Liability, Winn Friddell, Negligence and Insurance Sub-Committee, and John Sly, Professional Liability. We feel that there is an opportunity for us to enhance these Substantive Law

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Committees and through them enhance the service that the MDC provides to you, its members. If you do not hear from us, please feel free to contact any of these Substantive Law Committee Chairs with ideas for improving how the MDC impacts your practice.

Our Judicial Selections Committee for 2006–07, under the continued leadership of John Sweeney, has added Susan Durbin Kinter and Dana Moylan as Co-Chairs. If you are interested in reviewing judicial candidates, please contact any of our Chairs. Richard Flax and Dwight Stone again are Co-Chairs of our Appellate Practice. Should you have a matter that you believe the MDC should entertain regarding an appellate matter or potential amicus practice, please contact them or one of our Substantive Law Chairs. Under Sky Woodward's leadership, the MDC sponsorship initiative was a tremendous success and we hope to build on that success during the upcoming term. Essential to the success of our sponsorship and to us providing value to you, our members, are Program Chair, Jennifer Lubinski, Sponsorship Chair, Nikki Nesbitt and Membership Chair, Kathleen Hardway. Please come out and meet our Sponsors; better yet please use them in your practices. They have made a significant commitment to us.

As we all have discovered in our Law practices, communication is everything. I am pleased that Matt Wagman has agreed to serve as our *Defense Line* Editor, Michelle Dickinson has agreed to serve as our Assistant Editor and that Mary Malloy Dimaio has agreed to continue to serve as our Public Relations, Web and Communications Co-Chair. I welcome Craig Thompson, from Venable, to our Board and as Co-Chair of the Public Relations, Web and Communications Committee. As the MDC balances comprehensive scholarship and extensive legal analysis through *The Defense Line* and other publications, with the speed and conciseness of email alerts, and as we begin to even more effectively use the Web and other communications media, we welcome your thoughts throughout the year.

Hal McLaughlin and Bob Erlandson, two Past-Presidents, have again agreed to serve this year as our Executive Branch Liaisons. Through their service, the MDC has become as significant and viable before the Executive Branch as we have been before the Legislative and Judicial branches of government.

Finally, the MDC is strengthened and supported in our mission by DRI. As we continue to take advantages of the opportunities our partnership with DRI provides, we do so under the leadership of DRI State Representative Peggy Ward and DRI Young Lawyers' Liaisons, Toyja Kelley and Marisa Trasatti.

I am honored to serve as your President and excited about the opportunities before the MDC in the upcoming year. We have an extraordinarily talented and enthusiastic Board, but that is not enough. I call upon you to consider becoming more involved in the MDC so that the MDC continues to be strong and vibrant. Please visit our website regularly and contact your MDC Board members or our excellent Executive Director Kathleen Shemer as needed. In order for the MDC to remain a vital and growing organization, we need to continue to keep getting new, committed people involved. I sincerely hope that you will be one of them.

Editor's Corner

This edition of *The Defense Line* features a lead article from John Sly of Waranch & Brown, LLC, who is also Chair of MDC's Professional Liability Subcommittee, and David Mandell, who was a summer associate at Waranch & Brown. John's article discusses a recent unreported Court of Special Appeals opinion, *Rankin v. University of Maryland Medical System Corp., et. al.*, where the Maryland Court allowed for the application of supervening cause in a medical malpractice case. We also are fortunate to have an eye-opening article written by Marvin J. Muller of Segal McCambridge Singer & Mahoney regarding Homeland Security issues facing companies that may employee illegal aliens.

Finally, as many of you know, the Defense Research Institute's 2006 Annual Meeting is taking place from October 11, 2006 through October 15, 2006 at the San Francisco Marriott in San Francisco, California. The program, available on DRI's website (http://www.dri.org), is going to be fantastic, particularly with speakers Pat Buchanan, political insider and journalist; Donna Brazile, author and political strategist; Kenneth Starr, former Solicitor General and Independent Counsel for Whitewater; and Larry Posner, nationally known cross-examination expert and attorney for the National Football League's Denver Broncos. In addition to these impressive speakers, the conference features countless blockbuster programs. The members of the MDC would benefit greatly from attending this conference and we hope to see you all there.

The Editors sincerely hope that the members of the Maryland Defense Counsel enjoy this administration's first issue of *The Defense Line*. In that regard, 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 one of the Editors, Matthew T. Wagman (410) 385-3859 or Michelle J. Dickinson (410) 580-4137.

Maryland Businesses Beware: New Department of Homeland Security Initiatives Make Employment of Illegal Aliens a "Bet the Company" Proposition

By Marvin Muller

After several weeks of searching for a qualified Software Engineer and many wasted hours spent interviewing job applicants, your client, a busy accounting firm, finally encounters what they believe will be an intelligent, hard-working employee. They offer her the job and on the first day of work complete the usual laundry list of paperwork including the I-9 Employment Eligibility Verification Form. The new employee provides valid proof of identification and employment authorization that appears to be valid. Several weeks later, your client receives a letter from the Social Security Administration indicating that the social security number provided by the new employee is invalid. The manager reviews the I-9 documentation again and does not notice any errors. Knowing that the company will be unable to meet several upcoming deadlines for an important client if the new employee is fired, the manager decides to wait a few weeks until the project is over before addressing the issue. The project takes longer than expected and precisely thirty days later, the company receives a Notice of Intention to Fine from the Department of Homeland Security and calls you.

Does this scenario seem unlikely? Recent border and enforcement actions indicate that the Department of Homeland Security is seeking to detain and remove each and every person that is unlawfully present in the United States. The days of relaxed enforcement policies are at an end and changes to the legal landscape are occurring in order to streamline the detention and removal process. Immigration & Customs Enforcement is no longer just enforcing outstanding warrants—they have made it clear they intend to go after all unauthorized workers, regardless of worksite location. Now more than ever, an unknowing violation can lead to prosecution from the Department of Homeland Security. Moreover, the Department of Homeland Security is making unprecedented attempts to reach out to employers who presently may have unauthorized workers on their payrolls.

The Changing Landscape

Immigration roundups are on the rise. Recently, as part of the "Secure Border Initiative," Immigration & Customs Enforcement agents located and arrested 61 fugitive aliens in Florida in one week alone. Similarly, a four day sweep in Kansas City resulted in the arrest of 37 illegal aliens as part of "Operation Return to Sender." Working under the same initiative in Oklahoma, 127 illegal aliens were arrested. These enforcement actions are occurring all over the country. At the U.S. Army installation in Ft. Bragg, North Carolina, Immigration & Customs Enforcement agents apprehended 58 illegal workers attempting to enter the base. In response, Immigration & Customs Enforcement Assistant Secretary Julie L. Myers was quoted as saying, "No industry or location is immune from future ICE enforcement actions." Only a few days later, agents shut down and seized Garcia Labor Company, a temporary service agency. The president and owner, Maximino Garcia, was arrested and charged with 40 counts of employing unauthorized workers and, if convicted, he stands to lose $12 million in assets. In reference to this case, Secretary Myers was quoted as saying, "Criminal indictments like this one unsealed today are the future of worksite enforcement."

Despite these ongoing enforcement actions, DHS consistently faces problems of their own in locating housing for those in custody, and preventing the reentry of those that were previously removed from the U.S. Although current laws give broad powers to ICE border agents to arrest and prosecute all illegal entrants, there simply are not enough beds in the existing detention centers to accommodate everyone. As a result, most individuals that are caught along the border simply are returned to the point of entrance and released with an advisory not to reenter. In a direct attempt to combat this problem, the Department of Homeland Security is increasing its existing detention capacity.

Indeed, on August 1st The GEO Group, Inc. announced that it entered into a contract with Immigration & Customs Enforcement to expand the contract capacity of the existing 1,020-bed South Texas Detention Complex located in Pearsall, Texas, by 884 beds. Additional assistance to curb the flow of unlawful entrants may be coming from the U.S. Congress. Although there are many differences between the current immigration bills passed by the House and Senate, Congressman Mark Souder of Indiana notes that both the House and Senate versions appear to agree on the need for increased border fencing. In his July 20th statement to the Subcommittee on Criminal Justice, Drug Policy and Human Resources, he noted that both of the recent immigration bills called for the creation of hundreds of miles of additional border fencing.

A national campaign to increase enforcement actions also is evidenced by the July 31st announcement of Attorney General Alberto R. Gonzales in which he outlined a plan to add 25 Assistant U.S. Attorneys to the five federal law enforcement districts along the border. In support of these changes he stated that, "[t]hese new prosecutors will help ensure that our immigration and drug laws are aggressively enforced." Department of Homeland Security Secretary Michael Chertoff agreed with the need for additional legal staff and announced that the "DHS will also dedicate additional lawyers to assist U.S. Attorneys and ensure that our nation's laws are enforced."

In an effort to decrease the amount of time that detained aliens spend in custody, the U.S. Department of Justice, Executive Office for Immigration Review recently announced a plan that will tighten their procedures governing appellate review of the

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removal process. In the past, detained individuals were given more than one opportunity to obtain a 21 day extension of time in order to file appeal briefs with the Board of Immigration Appeals ("BIA"). As of August 14, 2006, however, the BIA allows only for a one-time, 15 day extension, regardless of the difficulty detainees have in locating competent legal counsel. Various nonprofit legal assistance organizations expressed their concern that many detainees will go unrepresented as a result.

Employer Liability

A. The I-9 Form

Everyone knows that employing an unauthorized worker is illegal. What most laypersons do not understand is how to determine exactly who is and is not authorized to work. Section 274A of the Immigration & Nationality Act places the responsibility for making these determinations directly on employers. Employers are required to complete an I-9 Employment Eligibility Verification Form for all employees within three days of hiring. There are few exceptions. These forms then must be retained and updated as needed. I-9 form completion requires an in-depth review of certain documents regarding each employee's identity and proof of employment authorization. Although employers seldom have trouble obtaining the required documentation from U.S. citizens, it often is quite difficult for an employer to determine the validity of a document presented by a foreign-born worker. This is due in part to the numerous types of valid employment authorization documents issued by the government in past years.

Although the I-9 form and accompanying instruction booklet appear rather simple to understand, there are a variety of serious issues that an employer may encounter. For example, section 274A(a)(1) makes it illegal for an employer to hire, recruit or refer for a fee someone not authorized to work. Employer liability is not limited to "knowing" violations but also includes situations where the employer has "constructive knowledge" of an employee's lack of authorization. 8 C.F.R. § 274a.1(l)(1) Although the law does not specifically establish a time limit for firing an unauthorized worker, employers have been sanctioned in the past for failing to discharge a worker within two weeks of learning of an unauthorized status. This means that employers must be prepared to make quick determinations regarding the validity of a worker's documentation. Failing to do so could result in the imposition of financial penalties up to $5,000 for each incident. At the same time, an overly cautious employer that requires specific or duplicative documentation and wrongfully rejects an otherwise valid employment authorization document of a prospective or current employee may be subjected to a discrimination lawsuit under INA §274B. In addition, any false attestations on an I-9 form (even if unintentional) can lead to separate criminal charges in federal court.

B. The Role of the Social Security Administration

Once the employer begins reporting wages with the social security number listed on the I-9 form, the Social Security Administration is charged with the responsibility of credit-

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ing the wages to the proper social security account for each worker. As one might imagine, mistakes are often made in this reporting process. In such instances, the Social Security Administration will send the employer a "no-match" letter when there is a discrepancy between the name and social security number used, or when the number simply does not exist in its system. The employer is then responsible for reviewing the discrepancy and resubmitting proper documentation. Traditionally, the Social Security Administration only sends these letters to employers that have ten or more mismatched numbers in their accounts. This means that many employers might be unknowingly employing an illegal worker in spite of their good faith efforts at developing and maintaining an I-9 compliance program.

C. Constructive Knowledge of Unlawful Employment

In its present form, 8 C.F.R. § 274a.1(1)(1) outlines two examples of circumstances when an employer may be deemed to have constructive knowledge of an employee's lack of employment authorization: (1) when there is a failure to properly complete the I-9 form, or (2) when the employer has information that would indicate the alien is not eligible for work, such as knowledge that a labor certification application was initiated on behalf of the employee. On June 14, 2006 the Department of Homeland Security Citizenship & Immigration Service proposed a new rule that, in addition to codifying existing case law, would include two additional examples of an employer's constructive knowledge of unauthorized employment. See 71 F.R. 34281-34285 (June 14, 2006). The proposed rule adds that an SSA "no-match" letter, or a written notice from the Department of Homeland Security that the document used to evidence a worker's immigration status is not authentic, will serve as constructive knowledge of an employee's inability to accept employment, thus, broadening the scope of employer's legal liability for hiring an unauthorized worker.

The proposed rule change also includes a provision that would provide employers with "safe-harbor" protection from prosecution after receiving notice, but only if the employer follows the specifically described procedures. First, employers will be expected to review their existing records to determine whether the discrepancy is due to a typographical error on any of the I-9 documentation. If no error exists, the employer must then promptly request the employee to confirm the validity of the documentation previously submitted. These checks must be completed within 14 days in order to receive "safe-harbor" protection and not be subjected to further scrutiny. If the discrepancy remains unresolved, the employer will need to take action to terminate the employee or else face the risk of potential sanctions by the DHS for violating INA § 274(a)(2).

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D. Basic Pilot Employment Verification Program & I.M.A.G.E.

In an attempt to assist businesses with their I-9 compliance requirements, the DHS created the Basic Pilot Employment Verification Program. After registering online at https://www.vis-dhs.com/EmployerRegistration, participating employers are required to pay a nominal fee and sign an 11 page Memorandum of Understanding that outlines the requirements for using the system. Currently, the Department of Homeland Security Citizenship & Immigration Service reports there are more than 10,000 participating employers. On July 26, 2006 the Department of Homeland Security announced another related initiative called the Immigration & Customs Enforcement Mutual Agreement between Government and Employers ("IMAGE") that will work in tandem with their pilot program. Under this program, Immigration & Customs Enforcement seeks to partner with companies in various industries that will agree to adhere to a series of best practices, including but not limited to, participation in the Basic Pilot Employment Verification Program referred to above. IMAGE partners must submit to an audit of their hiring and employment practices and in exchange, Immigration & Customs Enforcement will provide training to staff and assistance to correct isolated, minor compliance issues that are detected. Interested companies are encouraged to visit the ICE website at www.ice.gov for more information.

E. Practical Advice

Many employers are unwilling to rely upon these government-run systems for determining effective hiring practices and choose instead to consult a knowledgeable immigration practitioner in order to develop an I-9 compliance program that can be incorporated into their existing human resources hiring practices. It is extremely important to advise your clients that I-9 compliance does not end with the completion of the initial I-9 form. At the very least, your clients should have a system that enables human resources personnel to properly (1) determine the validity of all employment authorization documents, (2) complete re-verifications of expiring documentation on a timely basis, (3) respond to Social Security mis-match letters, and (4) retain the I-9 forms. Although a comprehensive I-9 compliance program may require a bit of time and effort, you should advise your clients that a substandard program will subject them to an increased likelihood of costly civil or criminal penalties and litigation.

Marvin Muller is an associate at Segal McCambridge Singer & Mahoney in Baltimore, Maryland. He speaks Spanish fluently and is a participating member of the American Immigration Lawyers Association. He processes all types of family and employment-based immigrant and nonimmigrant visas, and represents individuals in removal proceedings and at all stages of appellate review. Contact (410) 779-3960 or mmuller@smsm.com.

(SUPERVENING CAUSE) *Continued from front cover*

sidered a "legally cognizable cause." As the Court of Special Appeals recognized in *Yonce v. Smithkline Beecham*, 111 Md. App. 124, 680 A.2d 569 (1996), Maryland courts have used two different tests when determining whether a defendant's negligence is the cause in fact of a plaintiff's injury. *Id.* at 138. The first is whether a cause was a "but for cause" and the second is whether the cause was a "substantial factor." *Id.* The "but for" analysis does "not resolve situations in which two independent causes concur to bring about an injury." *Id.* Thus, the "substantial factor" test, as described in Restatement (Second) of Torts § 433, is often applied in such situations.

Subsection (b) of § 433 of the Restatement (Second) of Torts is critical to any causation inquiry. It defines, in part, the "substantial factor" test as "whether the actor's conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm, or ***has created a situation harmless unless acted upon by other forces for which the actor is not responsible.***" Restatement (Second) of Torts § 433(b) (emphasis added). The *Yonce* Court further noted that Restatement (Second) of Torts § 435 (2) provides that, "the actor's conduct may be held not to be a legal cause of harm to another where after the event and looking back from the harm to the actor's negligent conduct, it appears to the court highly extraordinary that it should have brought about the harm." *Yonce*, 111 Md. App. at 139.

On March 28, 2006, the Court of Special Appeals issued an unpublished unanimous opinion in *Rankin v. University of Maryland Medical System Corp.* in which it found a supervening cause. While unpublished, the Court's analysis is instructive.

On October 10, 1997, Sarah Rankin ("Ms. Rankin") suffered a serious head injury in a serious motor vehicle collision. She was transported from the scene by helicopter to the Shock Trauma Center at the University of Maryland. When she arrived she was found to be in a deep coma. While still hospitalized at Shock Trauma, Ms. Rankin underwent a tracheostomy in anticipation of prolonged ventilator support. Thereafter, she slowly emerged from her coma until she was discharged to Frederick Health Care Center ("FHCC"), a subacute rehabilitation facility in Frederick, Maryland, on October 28, 1997. At the time of her discharge, she still had a tracheostomy tube.

> "On the issue of whether the negligence of a health care provider was a "cause" of the patient's injuries, the doctrines of "proximate" cause, "supervening" cause, and "legal" cause are applied the same in a medical malpractice action as they would be applied in any other negligence action."

Soon after Ms. Rankin's arrival at FHCC on October 28th, she experienced serious breathing problems that required transport to Frederick Memorial Hospital. After treatment, Ms. Rankin was returned to FHCC. Five days later, on November 2, 1997, Ms. Rankin returned to Frederick Memorial Hospital in respiratory distress. Again, Ms. Rankin was treated and returned to FHCC. Finally, on November 6, 1997, nine days after her discharge from Shock Trauma, Ms. Rankin experienced an acute cardiopulmonary arrest at FHCC. She was found not breathing and pulseless. Shock Trauma was never made aware of these post-discharge events before suit was filed.

Plaintiffs alleged that Ms. Rankin suffered a severe anoxic brain injury due to the events of November 6th. Plaintiffs conceded that no injury resulted from the October 28th or November 2nd incidents. Plaintiffs attributed Ms. Rankin's breathing problems to the size of the endotracheal tube used by Shock Trauma. They also alleged that FHCC and its personnel were unqualified to care for Ms. Rankin.

After a lengthy trial in the Circuit Court for Baltimore City, the jury returned a verdict against the physician responsible for caring for Ms. Rankin at FHCC, and the nurse at Shock Trauma who coordinated Ms. Rankin's discharge to FHCC. The trial court then granted judgment notwithstanding the verdict ("JNOV") and/or in the alternative, a new trial in favor of the Shock Trauma nurse. The appeal ensued.

The Court of Special Appeals affirmed the grant of JNOV because the "'chain of causation' linking [the Shock Trauma nurse's] negligence to the injuries [Ms. Rankin] suffered on November 6, 1997 was 'broken' by the events of October 28, 1997 and November 2, 1997, when [Ms. Rankin] was (1) treated at Frederick Memorial Hospital, and (2) transported back to FHCC." *Rankin* at 25. The Court found JNOV appropriate "despite the fact that [plaintiffs'] 'standard of care' evidence was sufficient to generate a genuine question of fact on the issue of whether [the Shock Trauma nurse] was negligent." *Id.* at 8–9.

The *Rankin* Court noted that sufficient supervening actions on the part of independent health care providers occurred after Ms. Rankin's discharge from Shock Trauma, i.e., her interactions with health care providers at Frederick Memorial Hospital. Moreover, the Court recognized that nine days had passed since her discharge. Citing to *Yonce* and Section 435(2) of the Restatement (Second) of Torts, the Court determined that it was "highly extraordinary that [the Shock Trauma nurse's] negligence should have brought about the harm." *Id.* at 27.

The burden necessarily falls on the party alleging supervening cause. However, presented with the right facts, the Court of Special Appeals has revealed in *Rankin* that the concept is alive and well.

John T. Sly, Esq., Waranch & Brown, LLC

David Mandell served as a summer associate at Waranch & Brown and co-authored this article.

New Members

Bernard A. Meis

Dana L. Moylan

Kimberly T. Owens

Shannon E. Peters

Craig A. Thompson

Jason T. Wasserman

The Impact of *USAA v. Riley* on Lead Paint Litigation in Maryland

By Susan E. Smith

In the typical lead poisoning case in Baltimore City, it is alleged that a minor child contracted lead poisoning while residing at a particular dwelling during a period of years. There are two insurance coverage issues that frequently arise in these cases: when did the exposure occur, and if there are multiple policies, are the limits of all policies at risk? The Court of Appeals' recent decision in *USAA v. Riley*, 393 Md. 55 (2006) addresses both issues, and will have a significant impact on all future lead poisoning cases in Maryland.

The *Riley* case was a declaratory judgment action filed by USAA to resolve an insurance coverage dispute that arose in a lead poisoning case pending against its insured in the Circuit Court for Baltimore City. In the tort suit, the plaintiffs alleged that the children of a former tenant at a rental property owned by the insured suffered brain damage due to lead poisoning. Because the lead exposure allegedly occurred over a period of several years, the plaintiffs sought to recover the limits of four consecutive insurance policies available to USAA's insured.

In the declaratory judgment action, USAA argued that there was no evidence that the children suffered "bodily injury" as defined by the policies during the first two policy periods, and that its maximum exposure was one policy limit, rather than the limits of all policies on the risk during the period of the tort plaintiffs' tenancy (e.g., that there was only one occurrence). The Circuit Court for Baltimore City issued a declaratory judgment stating that, among other things, the alleged lead exposure over a period of years was only one "occurrence" as defined by the policy; that the Limit of Liability provision in the policy limited the recovery of damages to the aggregate limit of $300,000; and that there was no evidence that the children suffered "bodily injury" within the meaning of the policy during the first two policy periods. (There was no evidence of any elevated blood lead levels during the first two policy periods.)

The Court of Special Appeals disagreed. In its opinion, reported at 161 Md. App. 573

(***USAA v. Riley***) *Continued from page 9*

(2005), that court held that there was a genuine dispute of material fact as to whether the children were injured during the first and second policy periods, and remanded for further proceedings on that issue. On the "stacking" issue, the court held that all policies on the risk from the date of initial exposure to the final manifestation were triggered. The Court of Appeals then granted *certiorari* and affirmed on both issues.

In deciding the "trigger" issue (i.e., when did "bodily injury" occur), the Court of Appeals carefully examined the evidence presented in the tort case. There was evidence from the tort plaintiffs' medical expert, Dr. Howard Klein, that lead is a toxin and that any exposure results in cellular damage; that the children's lead exposure began on the date they first moved into the property (before any blood tests showed elevated blood lead levels); and that they sustained bodily injury as a result of that exposure. USAA challenged the reliability and factual basis for Dr. Klein's opinions, but the Court of Appeals found his opinions to be sufficiently reliable and adequately supported by the facts and the scientific literature. There also was evidence from another witness that the children were observed ingesting lead paint at the property from the very beginning of their tenancy. The Court of Appeals concluded this evidence was "more than enough" to demonstrate that the children sustained "bodily injury" as defined by the policy sufficient to trigger the coverage available under the first two policies.

This aspect of the *Riley* opinion suggests that evidence that a child was present in a dwelling with deteriorated lead based paint and was observed to have ingested paint chips and dust is sufficient to prove "bodily injury" for purposes of triggering insurance coverage, even without proof of an elevated blood lead level. Although a blood test showing an elevated blood lead level has historically served as a benchmark for proving exposure, the *Riley* decision signals that Maryland's appellate courts are willing to disregard that bright line test.

As for the "stacking" issue, USAA argued that the Limit of Liability clause limited its exposure to a maximum of $300,000 (the aggregate limit in the policy). The Court of Appeals held that the clause at issue was ambiguous because it did not use language specifically saying the single policy limit of liability applied regardless of the number of policies involved. It therefore ruled against USAA and permitted "stacking" of all four policies implicated by the tort plaintiffs' claims (e.g., the limits of each policy were available to pay any settlement or judgment).

The Court of Appeals' decision in *Riley* impacts all future lead poisoning cases in Maryland in two significant respects. First, it makes it easier for plaintiffs to trigger coverage under insurance policies that were in effect before any documentation of an elevated blood lead level. Second, it permits the "stacking" of successive insurance policies when there is evidence of exposure across several consecutive policy periods.

Susan E. Smith is a senior associate at Crosswhite, Limbrick, & Sinclair, LLP. Her practice focuses on civil litigation and insurance coverage.

Membership on the Board of Directors of the Pro Bono Resource Center of Maryland

The Pro Bono Resource Center of Maryland (PBRC) is seeking a Board member who is committed to its mission of promoting equal access to justice through the recruitment, training and support of volunteers and serving as a resource for the legal community. Members are expected to support the organization through regular attendance at Board meetings; service on at least one committee; an annual financial contribution, and promotion of PBRC in the legal and business communities. PBRC strives to maintain racial, gender and geographic diversity.

Interested persons should submit their resumes to Thomas M. Meachum, Chairman, Committee on Appointments, Maryland State Bar Association, c/o Reese & Carney, LLP, 10715 Charter Drive, Suite 200, Columbia, Maryland 21044 or fax their resumes to Mr. Meachum at 410-730-7729, no later than November 2, 2006

SPOTLIGHTS

J.P. Delphey Limited Partnership v. Mayor and City of Frederick, No. 1466, September Term, 2004. Christopher J. Heffernan, a Partner at Niles, Barton & Wilmer, LLP, represented the City of Frederick at trial and on appeal of this eminent domain case. The land owner appealed the decision of the Frederick County Circuit Court that the City had properly exercised its authority to condemn the real property adjacent to the courthouse for the construction of a public parking deck and City offices. Appellant argued that the City acted improperly by voting in a closed executive session to proceed with the condemnation, instead of enacting an ordinance for the condemnation of the specific property in question. The Court of Special Appeals, in an unreported decision, agreed with Appellee that the City had pre-existing condemnation authority through its municipal charter and its enactment of several Capital Improvement Budgets that included the acquisition of the real property for the parking deck. The Court further agreed that the City's decision to proceed with the condemnation in accordance with its authority was executive, not legislative, in nature and did not require an ordinance. Accordingly, the judgment was affirmed with costs to be paid by the Appellant.

Despite admitting liability, Scott Burns of Tydings & Rosenberg LLP obtained a zero dollar verdict on behalf of a national pharmacy chain in a case where the plaintiff allegedly developed fibromyalgia as a result of being struck by a malfunctioning door while entering a pharmacy. In a key pretrial ruling, Judge D. Warren Donahue of the Circuit Court for Montgomery County precluded on *Daubert* grounds the plaintiff from offering expert testimony that trauma from being struck by a door caused the plaintiff to develop fibromyalgia several years later. At trial, the defense introduced videotape surveillance of the plaintiff performing many of the activities she claimed to be unable to perform and records of a prior incident involving the same area of the body that at deposition the plaintiff claimed did not cause her any problems but in a prior workers' compensation proceeding had claimed caused her to be temporarily totally disabled.

Doug Murray and Dale Garbutt of Whiteford Taylor Preston achieved a great outcome in the Federal Employers Liability Act case of *Leroy Hanekamp v. CSXT* tried before Judge Gary G. Leasure in the Circuit Court for Allegany County from September 5 through September 15. The Plaintiff alleged he suffered a cumulative trauma injury to both his knees as a result of negligence on the part of CSXT, and therefore had to undergo a left total knee replacement and faces a right total knee replacement in the future. Plaintiff's counsel, Richard Cranwell and Keith Moore, sought at least $600,000 in damages. The jury awarded the Plaintiff $42,000, of which a very modest amount will remain after the payment of the Plaintiff's attorney's contingent fee, the expert witnesses' fees and other costs.

Garvey v. Morris, et al., Circuit Court for Anne Arundel County (3/2006). Craig B. Merkle and Tara M. Clary of Goodell, DeVries, Leech and Dann, LLC obtained a defense verdict on behalf of an obstetrician and gynecologist after a four day jury trial. The Plaintiff claimed to have suffered from foreshortening following the performance of a vaginal hysterectomy, requiring surgical grafting of a new vaginal canal. The defense presented expert testimony that the hysterectomy was indicated and the defendant physician appropriately performed the gynecologic surgery. The defense maintained that the Plaintiff gradually developed unusual postoperative scarring. The Plaintiffs requested over $500,000 in damages for pain and suffering and past medical expenses. The jury found no breach in the applicable standard of care and returned a defense verdict. Plaintiff's counsel—Paul Bekman, Salsbury, Clements, Bekman, Marder & Adkins. Judge: The Honorable Paul F. Harris, Circuit Court of Maryland for Anne Arundel County. Trial: March 2–7, 2006.

After an eight day trial and more than a day of jury deliberation, James A. Rothschild and Michael J. Carlson, partners with the law firm of Anderson, Coe & King, LLP, received a defense verdict in the case of *Renee Newsome v. Penske Truck Leasing Corporation* in the United States District Court for Maryland, Southern Division. Bringing suit under Title VII of the Civil Rights Act of 1964, Ms. Newsome alleged that she had been sexually harassed and subjected to retaliation while employed at Penske's facility in Capitol Heights, Maryland. As a result of the harassment and retaliation, Ms. Newsome contended that she was forced to resign her employment, resulting in her constructive discharge.

In February 2002, Ms. Newsome was hired by Penske as a clerk. She testified that she was sexually harassed for the entirety of her two years and four months of employment with Penske by at least nine co-workers and supervisors. She claimed that these employees subjected her to unwanted vulgar comments and repeatedly touched her in inappropriate ways. Ms. Newsome alleged that she reported her problems to several supervisors, all of whom failed to take action. She asserted that the harassment got worse toward the end of her employment and that as she continued to complain, the company started enforcing its attendance policy more strictly, giving her several written corrective actions, including a suspension. Even after Penske commenced an investigation into Ms. Newsome's complaints, Ms. Newsome insisted that the harassment continued, compelling her to resign her position.

Penske provided evidence that Ms. Newsome's allegations of harassment were fabricated in response to Penske's decision to enforce its attendance policy. Penske also presented evidence to satisfy the good faith defense, by showing that it had a sexual harassment policy and had promptly investigated Ms. Newsome's complaints of harassment.

After hearing testimony from twenty-three witnesses, the jury concluded that none of Ms. Newsome's co-workers or supervisors had sexually harassed her, that she was not constructively discharged, and that Penske did not retaliate against her by disciplining her for her excessive absences.

SPOTLIGHTS—CONTINUED

After three weeks of trial, James A. Rothschild and Michael J. Carlson, partners with the Baltimore, Maryland law firm of Anderson, Coe & King, LLP, received a defense verdict in the case of Deborah A. *Scheers v. Rite Aid Corporation, et al.* in the Superior Court for Camden County, New Jersey. Bringing suit under New Jersey's Law Against Discrimination, Ms. Scheers, who was employed at Rite Aid's store in Atco, New Jersey, alleged that she had been sexually harassed by her store manager, subjected to retaliation, and wrongfully terminated by Rite Aid. Rite Aid obtained judgment on the termination and retaliation claims in advance of trial. The verdict is the second obtained by Mr. Rothschild and Mr. Carlson in a sexual harassment case this year.

In August 2001, Ms. Scheers started working as an assistant manager of Rite Aid's store in Atco, New Jersey. Ms. Scheers alleged that her store manager started making harassing comments and brushing against her two months later. She testified that her complaints to her district manager went unheeded and that he merely responded that she should "punch him in the nose." She claimed that the sexual harassment culminated in an alleged sexual assault on November 28, 2001 in which Ms. Scheers asserted that the manager grabbed her breast as she was walking down a short flight of stairs, causing her to fall and aggravate a back condition. It was undisputed that Ms. Scheers reported the November 28 incident to her district manager in January 2002. Although the store manager denied any harassment, Rite Aid terminated him. Rite Aid denied that any incidents prior to the alleged sexual assault had been reported. Ms. Scheers, who was recently awarded disability benefits by the Social Security Administration, claimed that the fall on the stairs contributed to her disability and sought recovery of over $600,000 in lost wages. Ms. Scheers also alleged significant psychiatric injuries.

During trial, Rite Aid presented evidence that called into question Ms. Scheers' allegations that she was harassed. Ms. Scheers' own written statement, which she provided at the time of Rite Aid's internal investigation, only alleged harassment on November 28, 2001. Ms. Scheers' neurosurgeon testified that Ms. Scheers admitted to him that the November 28 incident involved a slip on the steps in which a co-worker tried to catch her to break her fall; she never told him that she had been sexually assaulted. Nor did Ms. Scheers tell co-workers or even family members who worked at Rite Aid that she had been harassed. Other evidence, including medical records, inconsistencies in Ms. Scheers' testimony and the lack of corroborating testimony also suggested that Ms. Scheers' claim was filed in retaliation for her October 2002 termination.

At the conclusion of the case, the Court granted judgment in favor of Rite Aid on Plaintiff's claim for economic damages. After hearing testimony from fourteen witnesses, including seven experts, the jury concluded that Ms. Scheers was not harassed by her store manager.

SPOTLIGHTS—CONTINUED

Circuit Court of Maryland for Baltimore City Jury Delivers Defense Verdict

MARYLAND—*Lanay Brown, et al. v. Daniel Realty Company, et al.*, Circuit Court of Maryland for Baltimore City (June 2006). On June 30, 2006 a jury entered a defense verdict in a lead paint case tried in the Circuit Court of Maryland for Baltimore City.

Plaintiffs, a minor child and her guardian, brought an action against the defendant property owner and property manager alleging that the minor plaintiff suffered a brain injury from lead paint exposure in the form of chipping, flaking and peeling paint while the plaintiff was a tenant at the subject property. In finding for the Defendants, the Baltimore City jury determined that the plaintiffs failed to prove that the property contained a lead hazard.

Plaintiffs' Evidence

The plaintiffs testified that the minor plaintiff resided at the subject premises from December 1990 through 1994. The minor plaintiff, born December 17, 1990, first tested positive for an elevated blood lead level of 12 micrograms per deciliter of whole blood (mcg./dl) in February 1992, followed by a peak blood lead level of 20 mcg./dl in October 1992. The minor plaintiff's guardian testified that there was chipping, flaking and peeling paint in various rooms while she and the minor plaintiff lived at the subject property.

Plaintiffs' causation expert, Jerome Paulson, M.D., stated that the minor plaintiff suffered brain damage due to lead paint exposure at the subject property. Dr. Paulson concluded that the minor plaintiff's lead exposure resulted in brain damage with neurological and cognitive deficits and a 6 point IQ loss. Dr. Paulson's opinions regarding the minor plaintiff's neurological and cognitive deficits were based on an evaluation and testing done by plaintiffs' neuropsychological expert, Barry Hurwitz, Ph.D. Dr. Hurwitz also testified regarding the results of his testing, which he concluded showed that the minor plaintiff had significant brain damage.

Plaintiffs' damages expert, Mark Lieberman, a vocational counselor, testified that due to her brain damage, the minor plaintiff would not be able to achieve a high school education. He calculated her economic damages at $414,153 in lifetime loss of earnings by comparing the expected earnings of a person with some college education to a person without a high school diploma.

Defendants' Evidence

The defendants presented evidence through the defendant property manager Daniel Perlberg and documents from the property owner, Daniel Realty Company, that the property had been painted and wallpapered two months before the plaintiffs moved in and that Daniel Realty reasonably responded to all complaints made during the tenancy.

Defendants also presented the *de bene esse* deposition testimony of plaintiffs' environmental testing expert, Shannon Cavaliere of ARC Environmental. Mr. Cavaliere reported that results of testing done by ARC Environmental on the property in May 1999. Mr. Cavaliere determined, based on the testing done, that lead existed at the property. Mr. Cavaliere testified, based on his expert report, that he had no evidence that the paint was deteriorated during the tenancy.

Defendants' expert pediatric neurologist, Joseph Scheller, M.D., testified that the minor plaintiff did not have brain damage, based on his evaluation and the neuropsychological testing done by plaintiffs' expert and by defendants' expert neuropsychologist, Jack Spector, Ph.D. Dr. Spector also concluded, based on the raw data obtained by Dr. Hurwitz and on his own testing, that the minor plaintiff did not have brain damage.

The Jury Verdict

In closing argument, plaintiffs asked the jury to return a verdict in the amount of $4 million, $414,153 in economic damages and over $3.5 million in non-economic damages. After a 7 day trial, the jury found that the property did not contain a lead hazard, chipping and peeling paint. The jury believed the defendants' evidence that the property was in good condition before, during and after the plaintiff lived there, and returned their verdict in favor of the defendants. The jury returned the defense verdict following deliberations lasting an hour and twenty minutes.

Attorneys for Defendants Daniel Realty Company, Daniel Perlberg and Wendy Perlberg: Thomas J. Cullen, Jr. and Michele R. Kendus of Goodell, DeVries, Leech & Dann, LLP in Baltimore.

Attorneys for Plaintiffs: Brian Brown of the Law Office of Saul Kerpelman in Baltimore.

THE ASTAR PROJECT:

Science and Technology Education for Maryland's Judges

Maryland judges discuss how they hope that science and technology education will assist them in managing cases and other roles.

NOVEMBER 15, 2006

3:00 P.M.–5:30 P.M. (SYMPOSIUM)
5:30 P.M.–7:00 P.M. (RECEPTION)

MARYLAND SCIENCE CENTER THEATER
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In July 2005, Chief Judge Robert M. Bell announced the Maryland judiciary's participation in the Advanced Science & Technology Adjudication Resources ("ASTAR") project. Since then, judges from Maryland's Circuit Courts, Court of Special Appeals and Court of Appeals have gone back to school to learn from acclaimed scientists in the areas of molecular biology, genetics, stem cells, DNA, neuroimaging, genetically modified plants and animal products, and scientific fraud. The first class of Maryland's ASTAR-trained judges will "graduate" this year.

The objective of the ASTAR project is to prepare judges to be better and more effective adjudicators when they encounter cases presenting scientific and technical evidence and issues. The project does not aim to create judicial "experts," only better adjudicators by increasing judges' comfort level with scientific principles while still allowing parties to try their cases. ASTAR training does not teach outcomes to issues or cases. In addition to becoming better adjudicators, ASTAR judges aspire to use their training in furtherance of appropriate roles in ADR, consultations with non-ASTAR judges confronted by science and technology issues, liaison with the bar and law schools, the preparation of scholarly articles, and promoting science and technology education for other judges.

MDC is proud to be the first specialty bar association to host a seminar on the Maryland judiciary's participation in ASTAR. The seminar will feature Court of Appeals Judge Glenn T. Harrell, Jr., other Maryland ASTAR-trained judges, and world-renowned scientists from the Johns Hopkins University School of Medicine.

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