THE DEFENSE LINE

A Publication From The Maryland Defense Counsel, Inc.

Spring 2006

Important Announcements

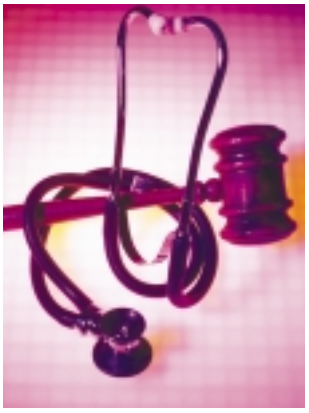
Mark your calendars now for the **Annual Crab Feast**
June 7, 2006
5:30 p.m.

Call 410.560.3895 or mddefensecounsel.org for details

If We'd Been Good at Science, Wouldn't We Have M.D. Behind Our Names?

MDC Participates in ASTAR

In October 2005, Chief Judge Robert M. Bell announced the Maryland Judiciary's participation in the Advanced Science & Technology Adjudication Resources ("ASTAR") project. In November, Judge Glenn T. Harrell, Jr., on behalf of the Court of Appeals, invited MDC and other bar associations to participate in a collaborative effort between the Johns Hopkins University School of Medicine and the Maryland Judiciary in the state's first in-state ASTAR program. The Maryland State Bar Association, Maryland Trial Lawyers' Association, Maryland State's Attorneys' Association, and the Maryland Criminal Defense Attorneys' Association were also invited to send a representative to the in-state conference. MSBA President, J. Michael Conroy, Jr., and three members of the Litigation Section Council—Keith R. Truffer, Kathleen McDermott, and Kathleen Meredith, represented MSBA. John J. Condliffe represented MTLA. T. Sky Woodward represented MDC.



What is ASTAR?

ASTAR is presently organized as a consortium between the Maryland and Ohio judiciaries. According to Judge Harrell, 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; to serve as resources to their in state and out of state judicial colleagues when they try such cases; to encourage authorship of scholarly articles on related topics; to enable judges to be more effective in alternative dispute resolution fora; and to liaison with the Bar and law schools on related topics. 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. The educational curriculum does not aim to teach answers, but to impart objectively and in a balanced way, information that will assist judges to become better adjudicators.

The ASTAR project arose from an earlier effort at sensitizing judges to the implications of the Human Genome Project. The Federal government earmarked a portion of the federal funding for the Human Genome Project to educate judges. A private, non-profit, educational entity, EINSHAC (Einstein Institute for Science, Health & the Courts) (www.einschac.org) was formed to implement the educational task. Approximately 47 conferences were produced nationally and internationally, one of which took place in 1997 for the combined judiciaries of Maryland and Delaware.

Chief Judge Bell was one of the early leaders of the EINSHAC effort, and currently chairs ASTAR's Board of Directors. He, along with Ohio Supreme Court Chief Justice Thomas Moyer and Dr. Franklin Zweig, a scientist and lawyer, formulated the ASTAR project as a private, non-profit corporation, to train and credential judges in cutting-edge science and technology information. The broad fields of bioscience and biotechnology were selected as the bases upon which the educational curricula would be developed.

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President's Message

Congratulations are in order for two (now former) MDC members—Judith C. Ensor and H. Patrick Stringer. Governor Ehrlich appointed Ensor and Stringer to the Circuit Court for Baltimore County.

In my first President's Message last fall, I introduced the 2005–06 MDC Board members and discussed projects and initiatives that were planned. In my second—and last—President's Message, I want to highlight some of these activities, and bring others to your attention.

T. Sky Woodward, Esquire

Miles & Stockbridge P.C.

Programs/Events

Program chair Jennifer Lubinski has done a great job this year organizing educational programs for our members. Judge Paul Grimm spoke to a full house in September on the attorney client privilege, the work product doctrine, inadvertent disclosure, proposed changes to the rules concerning electronic discovery, Rule 30(b)(6) depositions, and the medical review committee privilege. Judge Tim Meredith presented on the nuts and bolts of appellate practice at a dinner meeting held in November at the Middleton Tavern in Annapolis. At a brown bag lunch in March, Judge Carol Smith from the Circuit Court for Baltimore City and Harry Chase, Esq., Director of the Maryland Health Care Alternative Dispute Resolution Office, discussed "What's New in Health Claims Arbitration." In April, Larry Yumkus, Esq. will teach non-bankruptcy defense practitioners what they need to know about bankruptcy laws. In May, we will have a presentation on how to detect the malingering claimant. And again in May, MDC will host a presentation on making the most of your experts, featuring Chuck Faunce of Smart & Associates, a forensic accounting firm.

Mark your calendars for upcoming social events as well. MDC's Annual Meeting & Crab Feast, which will be held June 7, 2006 at Bo Brooks Crab House in Baltimore. New officers are elected at this meeting. And, on July 17, 2006, the Annual Golf Outing—an event jointly hosted with MTLA—will be held at Hayfield's Country Club in Hunt Valley.

Legislative Agenda

On January 17th, MDC hosted its annual Legislative Dinner in Annapolis, with lawmakers from the Senate and House judiciary committees attending. Since then, MDC's Legislative Committee has been hard at work preparing written and oral testimony on bills before the General Assembly, including MDC-sponsored legislation on post-judgment interest, a bill to increase juror compensation, and the Governor's medical malpractice legislation. MDC and its members' interests have been well represented by our lobbyist, John Stierhoff of Funk & Bolton and his assistant, Angel Lavin, as well as by the hard work of past-President Gardner Duvall, Legislative Co-Chairs, Mark Coulson and Chris Boucher, and other Board members—Peggy Ward, Ileen Ticer, Nancy Harrison, Joe Jagielski, Scott Burns, Laura Cellucci—who have contributed their time and expertise to various pieces of legislation. Special thanks also go to our Executive Committee Liaisons, past-Presidents Hal MacLaughlin and Bob Erlandson, on the hard work they are doing in Annapolis as well.

Judicial Selections and Retention of Sitting Judges

MDC supports a qualified, experienced, and diverse bench. To that end, the Judicial Selections Committee has been working hard—along with MDC volunteers from all over the state—interviewing prospective candidates for Circuit Court judgeships and making recommendations to Governor Ehrlich's office for those positions. Because we are committed to maintaining an experienced bench, MDC supports the retention of sitting judges. Over the next few months the sitting judges who face contested elections will be hosting fundraisers, and you can expect e-mail notices and personal phone calls about these events. Please consider contributing to these worthy campaigns and attending the fundraisers, and be sure to identify yourself as affiliated with MDC!

DRI

MDC was well represented at the DRI Annual Meeting in October 2005. Attendees included past-Presidents Bob Scott, Ford Loker, Bob Erlandson and Peggy Ward. Start making plans now for the 2006 DRI Annual Meeting, which will be held October 11–14, 2006 in San Francisco.

In March, MDC's Executive Director Kathleen Shemer attended DRI's Executive Director's meeting and Peggy Ward attended the State Representative's meeting. On April 21–22 2006, MDC will participate in the annual Mid-Atlantic Region State and Local Defense Organization meeting with colleagues from the District of Columbia, Virginia, North Carolina and South Carolina. This year's Mid-Atlantic meeting will be hosted by North Carolina and held in Greensboro. In June, MDC Board member Toyja Kelley will be a presenter at DRI's Diversity for Success Seminar in Chicago. Also, MDC members are serving in a number of DRI substantive committee leadership roles, including John Sweeney as the Vice-Chair of the Toxic Torts & Environmental Law Committee; Alex Wright as Membership Vice-Chair and Judiciary Liaison for the Alternative Dispute Resolution Committee; Peggy Ward as a Steering Committee member of the Trial Tactics Committee; Bob Erlandson as a Steering Committee member of the Workers' Compensation Committee; Don DeVries as Chair of the Chemical/Toxic Products Specialized Litigation Group ("SLG") within the Products Liability Committee; Tim Mullin as Chair of the Fire and Property Damage SLG within the Products Liability Committee; and Dan Lanier as Chair of the Hand and Power Tools SLG within the Products Liability Committee.

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National Foundation for Judicial Excellence

Last year, with DRI grant funding, the National Foundation for Judicial Excellence ("NFJE") was created. NFJE, a 501(c)(3) educational organization, focuses specifically upon advocating for and strengthening America's civil justice system by 1) providing meaningful support and education to the judiciary; 2) publishing scholarly work; and 3) engaging in other efforts to continually enhance and ensure judicial excellence and fairness. To further its mission of providing support and education to the judiciary, in July 2005, the NFJE hosted its inaugural Annual Judicial Symposium, which focused on science in the courtroom and was attended by more than 135 judges from 39 states. Mindful of judges' requirement to preserve impartiality and independence, the NFJE is committed to providing unbiased educational programming. The second Annual Judicial Symposium will be held in summer 2006. MDC has committed financial support to NFJE, and we encourage MDC members, law firms and clients to support the efforts of the organization as well. More information, including how to make a tax-deductible contribution, can be found at www.nfje.net or by contacting the organization's Managing Director, Margot Vettor, at 312.698.6211 or mvetter@nfje.net.

ASTAR

Last year, Chief Judge Bell announced the Maryland Judiciary's participation in the Advanced Science & Technology Adjudication Resource ("ASTAR") program. MDC, along with MTLA, MSBA, and the State's Attorneys' and Public Defenders' Associations, was invited to send a representative to the first in-state ASTAR conference held in January 2006 at the Johns Hopkins School of Medicine. You can read more about MDC's participation on pages 1 and 7–11.

Sponsorship/Non-Dues Revenue Project

In the next few weeks MDC Board members and Executive Director Kathleen Shemer will be reaching out to vendors who provide services to defense practitioners, seeking support from these vendors for MDC programs, events and publications. Please let President-Elect Joe Jagielski or Kathleen Shemer know of prospective MDC sponsors. And we encourage MDC members to utilize the services of our sponsors.

By the time you read this President's Message, my term will be almost over. It has been an honor and a privilege to serve you and our clients as MDC President, and to lead an organization dedicated to the integrity and preservation of the civil justice system and fair and equal treatment under the law for all parties. I am looking forward, however, to holding the best office that MDC has to offer: Past-President.

I'll see you on June 7th at Joe Jagielski's coronation!

—T. SKY WOODWARD

EDITOR'S CORNER

This edition of *The Defense Line* features an article about the Maryland Judiciary's participation in the Advanced Science & Technology Adjudication Resource ("ASTAR") Program. This is a collaborative effort between the Johns Hopkins University School of Medicine and the Maryland Judiciary. The object 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. We have included the case studies provided to the participants in order that you will know what the ASTAR judges have been thinking about. Kathleen Bustraan discusses a rare *en banc* decision of the Court of Special Appeals considering the doctrine of judicial estoppel and the discovery rule applicable to statute of limitation questions. Please take note of the new Baltimore City Circuit Court Motor Tort Early Mediation Project, which became effective January 2006. It may be taken up by other jurisdictions. We also feature an article on action in the Maryland General Assembly, including Post Judgment Interest and Medical Malpractice.

Finally, we include *Spotlights* led by an article by Kristine A. Crosswhite and Susan E. Smith on their recent victory in a case addressing the viability of a wrongful death claim based upon a suicide, and the propriety of dismissal as a sanction for continuous and repeated discovery abuses as well as other spotlights of recent cases from the Maryland Circuit Court and Federal District Court.

The editors ask for your support of *The Defense Line* by directing articles and spotlights for future editions to our editors Alexander Wright, Jr., 410.823.8250 or Matthew T. Wagman, 410.385.3859. We also welcome your comments or suggestions.

Legal Malpractice

By Kathleen M. Bustraan

In a rare *en banc* decision the Court of Special Appeals considered questions about the doctrine of judicial estoppel and the discovery rule applicable to statute of limitations questions. These issues came up in a legal malpractice case. Legal malpractice cases are important to all lawyers because they illustrate traps for the unwary and offer insight into issues facing the profession. *Meeks v. Dashiell*, 890 A.2d 779, 2006 Md. App. LEXIS 3 (Md. App. 2006) is especially important to all civil litigators because the specifics of the doctrines of judicial estoppel and the discovery rule apply in all kinds of litigation and are not confined to legal malpractice matters.

In his complaint for legal malpractice, Meeks alleged that he retained Dashiell to draft a prenuptial agreement in 1989, prior to his marriage to Melanie Davis. During Meeks' divorce proceeding Meeks filed a motion asking the divorce court to declare the prenuptial agreement enforceable as executed. This motion was granted and Meeks paid alimony to Davis. After the divorce case was over, Meeks sued Dashiell alleging that his attorney was negligent because an alimony waiver provision was not included in the pre-nuptial agreement that Meeks signed.

Dashiell responded to the complaint with a motion to dismiss or for summary judgment, arguing that the malpractice claim was barred by judicial estoppel, barred by the three-year statute of limitations, or that the complaint was defective because of a lack of causation. The trial court considering this motion ruled that judicial estoppel did not bar the claim but granted the motion on statute of limitations grounds after finding that limitations expired three years after Meeks signed the prenuptial agreement. Meeks appealed.

On appeal, Meeks argued that the trial court erred in failing to apply the discovery rule to the statute of limitations question. A sharply divided Court of Special Appeals held that there was a factual dispute concerning whether the malpractice claim was barred by the statute of limitations and affirmed the trial court's ruling denying the motion for summary judgment on judicial estoppel grounds. The appellate court vacated the judgment and remanded the case to the trial court for further proceedings.

Statute of Limitations

Meeks signed the prenuptial agreement that was the basis for his legal malpractice claim on November 3, 1989. *Meeks*, Slip Op. at 6, 14. His complaint for legal malpractice was filed on October 24, 2003. *Id.* at 14. He said that he first discovered that the waiver of alimony provision was not in the executed final prenuptial agreement when he consulted with an attorney in 2001 with respect to his divorce from Ms. Davis. *Id.* Meeks argued that an early draft of the proposed prenuptial agreement contained a waiver of alimony provision but that the final version did not. *Id.* According to Meeks, he was not made aware of any negotiations that occurred between the time he reviewed the draft of the prenuptial agreement and when he executed the final agreement or that the waiver of alimony provision was removed from the agreement. *Id.* at 15.

Dashiell attempted to hold Meeks to the terms of the prenuptial agreement that he signed, arguing that Meeks was bound to the contract by his signature even if he neglected to read it. The appellate court, however, found that whether a party is bound to a contract by his signature even if the party neglected to read the contract is a question of contract law that is not directly applicable to a negligence claim against a tortfeasor who was not a party to the contract. *Id.* at 15–16. This reasoning, according to the majority, does not conclusively establish as a matter of law that the statute of limitations for a legal malpractice claim against the attorney who prepared the contract expires three years after the date the contract was signed. *Id.*

In general, statutes of limitations represent a legislative policy determination of the appropriate and reasonable time for a person of ordinary diligence to initiate a legal action. *Christensen v. Philip Morris USA, Inc.*, 162 Md. App. 616, 875 A.2d 823 (2005), *cert. granted*, 389 Md. 124, 883 A.2d 914 (2005). The statutes "are designed to balance the competing interests of each of the potential parties as well as the societal interests involved." *Pierce v. Johns-Manville Sales Corp.*, 296 Md. 656, 665, 464 A.2d 1020 (1983).

Statutes of limitations are designed to "assure fairness to a potential defendant by providing a certain degree of repose." *Id.* They also provide a degree of certainty to defendants by limiting a claimant's ability to file stale claims, thereby reducing the inconvenience and hazards associated with delay, such as lost evidence, failed memory, unavailable witnesses, and the difficulty in planning for the future because of "the uncertainty inherent in potential liability." *Id.*; *see Pennwalt*, 314 Md. at 437–38. Such statutes also serve claimants, because they generally give potential litigants sufficient time to bring their claims as long as the claimant acts with reasonable diligence. *Pennwalt*, 314 Md. at 437–38; *Pierce*, 296 at 665. In addition, statutes of limitations "serve society by promoting judicial economy." *Hecht v. Resolution Trust Corp.*, 333 Md. 324, 333, 635 A.2d 394 (1994); *see also Pennwalt*, 314 Md. at 437–38; *Goldstein*, 285 Md. 673 at 684, 404 A.2d 1064.

Historically, a cause of action was deemed to have "accrued" in a tort action, and the statute of limitations began to run, when the actual wrong occurred. *Arroyo v. Bd. of Educ.*, 381 Md. 646, 851 A.2d 576 (2004), citing *Killen v. George Washington Cemetery, Inc.*, 231 Md. 337, 343, 190 A.2d 247, 250 (1963). Dissatisfied with the often unfairly harsh confines of such a rule, as it did not distinguish a claimant who was "blamelessly ignorant" of his potential claim from the plaintiff who had "slumbered on his rights," the Court of Appeals first recognized the "discovery rule" in the case of *Hahn v. Claybrook*, 130 Md. 179, 100 A. 83 (1917) (allowing for discovery rule in medical malpractice claims). *Id.* In *Poffenberger v. Risser*, 290 Md. 631, 431 A.2d 677 (1981), the Court of Appeals expanded the applicability of the discovery rule generally to all civil cases, in order to "prevent…injustice." *Doe v. Washington*, 114 Md. App. 169, 689 A.2d 634 (1997).

To determine when the statute of limitations accrues in a particular circumstance,

(LEGAL MALPRACTICE) *Continued from page 4*

a court must consider this question "with awareness of the policy considerations unique to each situation." *Hecht v. Resolution Trust Corp.*, 333 Md. 324, 338, 635 A.2d 394 (1994). The determination of when a cause of action accrues under the discovery rule is usually a determination made by the court. *Poffenberger*, 290 Md. at 633.

The cause of action accrues when it (1) comes into existence and (2) the claimant acquires knowledge sufficient to enable him to make an inquiry into who is responsible for the injury he suffered, and a reasonable inquiry would have disclosed the existence of the allegedly negligent act and the harm caused by the allegedly negligent act. *Edwards v. Demedis*, 118 Md. App. 541, 703 A.2d 240 (1997), cert. denied, 349 Md. 234, 707 A.2d 1328 (1998). Once on notice of a cause of action, a potential plaintiff is charged with responsibility for investigating, within the limitations period, all potential claims and all potential defendants. *Doe v. Archdiocese of Washington*, 114 Md. App. 169, 689 A.2d 634 (1997).

The beginning of limitations is not postponed until the end of an additional period of time that the plaintiff deems reasonable for making his investigation. *Lumsden v. Design Tech Builders, Inc.*, 358 Md. 435, 749 A.2d 796 (2000). As Judge Cathell, writing for the Court of Appeals, noted, it is: "the discovery of the injury, and not the discovery of all elements of a cause of action that starts the running of the clock for limitations purposes. Here, all that is required to commence the running of the limitations period is the discovery of an injury and its general cause, not the exact cause in fact and the specific parties responsible." *Id.* at 450, 749 A.2d quoting *Bayou Bent Towers Council of Co-Owners v. Manhattan Const. Co.*, 866 S.W.2d 740 (Tex. App. 1993).

Knowledge of the identity of a particular defendant is not necessary to trigger the running of limitations. *Doe v. Archdiocese of Washington*, 114 Md. App. 169, 689 A.2d 634 (1997). A cause of action accrues when there is some evidence of harm, even if the precise amount of damage is not known, and even if the plaintiff has suffered only trivial injuries. *Fairfax Sav. F.S.B. v. Weinberg and Green*, 112 Md. App. 587, 685 A.2d 1189 (1996). Settlement negotiations, without an inducement to defer filing suit or some indication that the limitations

defense would not be plead, does not defer the running of the statute of limitations. *Leonhart v. Atkinson*, 265 Md. 219, 289 A.2d (1972). Courts in Maryland rigorously protect the statute of limitations defense. *Johns Hopkins Hospital v. Lehninger*, 48 Md. App. 549, 564, 429 A.2d 538, *cert. denied*, 290 Md. 717 (1981).

The discovery rule generally requires that the plaintiff must have notice of a claim to start the running of limitations. *Hecht v. Resolution Trust Corporation*, 333 Md. 324, 336–337, 635 A.2d 394 (1994). Notice exists when the claimant has "expressed cognition or awareness implied from knowledge or circumstances which ought to have put a person of ordinary prudence on inquiry (thus charging the individual) with notice of all facts which such an investigation would in all probability have disclosed if it has been properly pursued." *Meeks*, Slip Op. at 19, quoting *Feritta v. Bay Shore Development Corp.*, 252 Md. 393, 402, 250 A.2d 69 (1969). The appellate courts have emphasized that mere constructive notice—which rests not on facts but strictly on legal presumptions—is insufficient to create notice because it would "recreate the very inequity that the discovery rule was designed to eradicate." *Meeks*, Slip Op. at 19, quoting *Poffenberger*, 290 Md. at 637, 431 A.2d 677.

Because of the parties' contrary assertions about when Meeks knew the final prenuptial agreement contained a waiver of alimony provision the appellate court ruled that summary judgment was inappropriate on the statute of limitations question.

Judicial Estoppel

Dashiell also argued that even if the appellate court reversed on the statute of limitations question, the appellate court should affirm the grant of his summary judgment motion based on the doctrine of judicial estoppel. Dashiell's theory is that because Meeks asked the divorce court to enforce the terms of the prenuptial agreement and paid alimony as set forth in the agreement, Meeks should be judicially estopped from arguing that his attorneys negligently failed to include a waiver of alimony provision in the prenuptial agreement. The majority declined the invitation to find that Meeks' claims were judicially estopped as a matter of law.

The phrase "judicial estoppel" was first used by the Court of Appeals in 1966 in *Messall v. Merlands Club, Inc.*, 244 Md. 18, 29, 222 A.2d 627 (1966), although the doctrine dates back to the late 1800's. The doctrine of judicial estoppel prohibits a litigant from "blowing hot and cold," by taking one position that is accepted by one court and advocating a completely contrary position in another court to try to gain an advantage. *Vogel v. Touhey*, 151 Md. App. 682, 722, 828 A.2d 268 (2003) *cert. denied*, 378 Md. 617 (2003), citing *Eagan v. Calhoun*, 347 Md. 72, 88, 698 A.2d 1097 (1997). The purpose of the doctrine is to protect the integrity of the court system rather than to protect the parties. *Id.* As Judge Adkins, writing for the Court of Special Appeals, explained in *Gordon v. Posner*, 142 Md. App. 399, 424, *cert. denied*, 369 Md. 180 (2002), judicial estoppel prevents a party who successfully pursued a position in a prior legal proceeding from asserting a contrary position in a later proceeding. Judge Adkins noted that "[t]here are two important reasons for estoppel. First, the doctrine of judicial estoppel rests upon the principle that a litigant should not be permitted to lead a court to find a fact one way and then contend in another judicial proceeding that the same fact should be found otherwise. Judicial estoppel ensures the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." 142 Md. App. at 425.

Judicial estoppel can be used to protect the courts from parties who make frivolous,

(LEGAL MALPRACTICE) *Continued from page 5*

false, and misleading allegations in judicial proceedings. *Wilson v. Stanbury*, 118 Md. App. 209, 702 A. 2d 436 (1997). The doctrine avoids "the unseemly encouragement of litigants' playing 'fast and loose' with the judicial system." *WinMark Ltd. P'ship v. Miles & Stockbridge*, 345 Md. 614, 622, 693 A.2d 824 (1997). As was observed in *WinMark*:

> *If parties in court were permitted to assume inconsistent positions in the trial of their cases, the usefulness of courts of justice would in most cases be paralyzed; the coercive process of the law, available only between those who consented to its exercise, could be set at naught by all. But the rights of all men, honest and dishonest, are in the keeping of the courts, and consistency of proceeding is therefore required of all those who come or are brought before them. It may accordingly be laid down as a broad proposition that one who, without mistake induced by the opposite party, has taken a particular position deliberately in the course of litigation, must act consistently with it; one cannot play fast and loose.*

Id. at 620, citing *Kramer v. Globe Brewing Co.*, 175 Md. 461, 2 A.2d 634 (1938).

Three factors are typically considered in deciding whether to apply the judicial estoppel doctrine in a particular case. For the doctrine to apply, (1) a party's later position must be clearly inconsistent with its earlier position; (2) courts inquire into whether the party succeeded in persuading a court to accept the party's earlier position so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled; and (3) the party must attempt to assert an inconsistent position to derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *Meeks*, Slip Op. at 25 citing *New Hampshire v. Maine*, 532 U.S. 742, 750–51 (2001). Absent success in a prior proceeding, a party's later inconsistent position introduces "no risk of inconsistent court determinations" and therefore poses little threat to judicial integrity. *Id.*

In recent years the doctrine of judicial estoppel has been regularly invoked in defense of legal malpractice claims. For example, in *Vogel v. Touhey*, 151 Md. App. 682, 722, 828 A.2d 268 (2003), *cert. denied*, 378 Md. 617 (2003) Maryland's intermediate appellate court affirmed summary judgment in favor of an attorney who was sued for mishandling the investigation of the marital assets in his client's divorce case. The client, herself an attorney, discharged counsel for the alleged failure to investigate the marital assets and a few days later appeared *pro se* at a master's hearing on approval of a settlement of the divorce case. There she declared the settlement agreement "fair and equitable," but ten months later sued her former attorney claiming that the same settlement agreement was unfair and inequitable. Her legal malpractice claim was barred by the doctrine of judicial estoppel. A similar result obtained in *Newell v. Hudson*, 376 N.J. Super. 29, 868 A.2d 1149 (2005), where a client retained two attorneys and a law firm to defend her in a divorce action. After lengthy negotiations, the client entered into a settlement agreement, and the client and her husband each testified that they understood and voluntarily consented to the agreement's terms. The client also testified that the agreement was a fair deal and the trial court approved the agreement. The attorney later instituted a collection action for the fees that the divorce client owed and the client counterclaimed for legal malpractice. On appeal, the appellate court found the client was judicially estopped from asserting in the malpractice case that the settlement agreement was unfair when she testified in her divorce action that it was fair.

Dashiell argued that Meeks' malpractice claim should be judicially estopped because of the inconsistency in Meeks' enforcement of the prenuptial agreement in the divorce court while asserting that it was not the agreement that Meeks believed it to be in the malpractice case. The majority declined to adopt Dashiell's argument, explaining that denial of Dashiell's motion for summary judgment is not the "final word on the merits of the question of whether Meeks' claims against Dashiell should be barred by judicial estoppel." (*Meeks*, Slip Op. at 33.) The majority nevertheless concluded that Meeks' malpractice claim was not "irreconcilably inconsistent" with his successful motion to enforce the prenuptial agreement in the divorce litigation and declined to find that the malpractice claim was barred as a matter of law. (*Meeks*, Slip Op. at 26.) The dissenting judges felt differently, writing that Meeks took "flatly inconsistent positions in the two cases" (*Meeks*, Dissenting Slip Op. at 26), succeeded in persuading the divorce court that the final prenuptial agreement was a negotiated agreement where the alimony waiver clause was removed as a concession to Davis (*Id.* at 41), and as a result of his contrary positions, Meeks gained advantages (*Id.*). The dissenting judges would have found that Meeks' legal malpractice claims were judicially estopped and would have affirmed the summary judgment ruling in favor of the attorney. Look for further appellate review of this important legal malpractice case.

The *Meeks* case is an example of the application of familiar defenses—the discovery rule and the doctrine of judicial estoppel—to address a complicated case. Although legal malpractice cases can be fact intensive and complex, they can be successfully defended. Remember that the best defense is the successful defense. Consider all options and utilize what works.

Kathleen M. Bustraan is a shareholder at Lord & Whip, P.A. She handles civil litigation in Maryland and the District of Columbia, including professional liability, drug and medical device cases and employment matters.

(ASTAR) *Continued from front cover*

Who are Maryland's ASTAR "resource judges"?

The inaugural class of Maryland's ASTAR judges include Judge Harrell, Judge Ellen L. Hollander on the Court of Special Appeals, and the following Circuit Court Judges: Brett W. Wilson (Dorchester County), W. Newton Jackson III (Wicomico County), Thomas G. Ross (Queen Anne's County), Ruth Ann Jakubowski (Baltimore County), Michael M. Galloway (Carroll County), Emory A. Plitt, Jr. (Harford County), James L. Sherbin (Garrett County), John H. McDowell (Washington County), Julie Stevenson Solt (Frederick County), John W. Debelius III (Montgomery County), Michael D. Mason (Montgomery County), Sean D. Wallace (Prince George's County), Cathy H. Serrette (Prince George's County), Michele D. Hotten (Prince George's County), Kaye Allison (Baltimore City), Stuart R. Berger (Baltimore City), Evelyn Omega Cannon (Baltimore City), Diane O. Leasure (Howard County), Paul A. Hackner (Anne Arundel County), Ronald A. Silkworth (Anne Arundel County), and Philip T. Caroom (Anne Arundel County).

According to Judge Harrell, this class of ASTAR judges will "graduate" in December 2006 and a new group of Maryland judges will participate in 2007.

What are Maryland's ASTAR judges learning?

The first class of ASTAR resource judges, selected by Ohio and Maryland and numbering approximately 50 (half from each consortium State and mostly trial judges), attended the first national ASTAR program, entitled "Boot Camp in the Language of the Life Sciences," in Warrenton, Virginia in October 2005. The "Boot Camp" program focused on DNA (with the judges extracting their own), stem cells, genetic diseases, and the science of addiction. A second national program for the initial Ohio and Maryland ASTAR Resource Judges was held March 9–11, 2006, at the University of North Carolina School of Medicine in Chapel Hill, to consider "Environmental Triggers of Cancer." A third national program is scheduled in October 5–8, 2006 at the John Marshall School of Law in Chicago, with expert witnesses as the topic.

> …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; to serve as resources to their in state and out of state judicial colleagues when they try such cases; to encourage authorship of scholarly articles on related topics; to enable judges to be more effective in alternative dispute resolution fora; and to liaison with the Bar and law schools on related topics.

Maryland's initial workshop took place at the Johns Hopkins School of Medicine on January 19–21, 2006, and focused on molecular biology, genetics, stem cells and neuroimaging. Specifically, the program included the following presentations: Primer on Cell Biology and Physiology, presented by Dr. Carolyn Machamer; Primer on Molecular Biology and Proteomics, presented by Drs. James J. Potter and Robert Cole; Gene Manipulation and Modifications, presented by Dr. David Johns; Genetics and Risks of Inherited Disease and Implications of Genetic Testing, presented by Dr. Zhiping Li and Dr. Debra J. H. Mathews; Stem Cell Primer, presented by Dr. John Gearhart; Bioethics Primer & Policy Overview, presented by Dr. Debra J. H. Mathews; In Vitro Fertilization & Preimplantation Genetic Diagnosis, presented by Dr. Gary Cutting; Hematopoietic Stem Cells, presented by Dr. Curt Civin; Spinal Cord Injury, presented by Dr. John McDonald, III; Physics of Imaging (MRI, fMRI, MR Spectroscopy), presented by Dr. Peter Van Zigl; Positron Emission Tomography (PET) in a Single Photon Emission Computed Tomography (SPECT), presented by Dr. Dean F. Wong; Clinical Applications for MRI, presented by Dr. Martin Pomper; and Imaging—Alzheimer's, Dementia & Competence, presented by Dr. Susan Resnick. Lab tours included microscopy, proteomics core, molecular biology, and stem cells. Among themselves, the judges also considered a series of case study problems. *(See Appendix, p. 8.)*

MDC has been invited to send representatives to the second in-state workshop, scheduled for April 27–29, 2006. The April 27th program will be held at the USDA Agricultural Research Center in Beltsville and will focus on genetically modified food products and related issues. On April 28–29th, the judges and guests will return to the Johns Hopkins School of Medicine to continue with molecular biology, genetics, stem cells, and neuroimaging, but this time with a clinical emphasis. The April in-state conference will also feature a panel discussion of law professors and private practitioners on judicial ethical issues associated with judges drawing upon the scientific knowledge gained through ASTAR conferences and otherwise. Former MDC and DRI President, Robert Scott of Semmes, Bowen and Semmes will be MDC's panel participant.

How Does MDC Fit in ASTAR's Future?

According to Judge Harrell, the Maryland Judiciary believes it advantageous for the practicing bar to have full knowledge to what and how Maryland judges are learning. In this regard, the Court will continue to invite members of the practicing bar, particularly through MSBA, MDC and MTLA representatives at in-state conferences. For MDC members, this will present a unique opportunity to learn what the ASTAR judges are learning, as well as contribute meaningfully to the curriculum going forward. If you are interested in becoming involved in MDC's ASTAR participation, please contact Sky Woodward at swoodward@milesstockbridge.com or 410-823-8161.

Appendix: Case Study Problems

What have Maryland's ASTAR judges been thinking about?

During the January 2006 in-state ASTAR conference, the judges broke out into two groups of 12 each to discuss hypothetical problems. Although non-judge attendees were provided the hypotheticals, they were not allowed to participate in the discussions.

Case Study Problem Presented January 19, 2006

Hopewell v. Wentworth, et al.

Bob and Sally Hopewell are a married couple that, for six years, had been trying without success to have a child. After fertility tests were conducted on both Bob and Sally, Sally's gynecologist, Dr. Galen, determined that the couple's sterility was due to Sally's inability to produce eggs capable of development after insemination. She referred Sally to a website that advertised the sale of eggs from female students at several of the local colleges. The website asserted that its donors were all very bright, attractive, and healthy young women and cited statistically high success rates, in terms of successful pregnancies and childbirths.

Sally called the phone number listed on the website. Her call was answered by a receptionist at the law firm of Rocca & Bye, and Bob and Sally were given an appointment with Sam Rocca, a partner in the firm. Mr. Rocca explained that, through contacts he had made in the medical community and among potential egg and sperm donors, he was able to help infertile couples obtain the joys of parenthood. He said that all potential sperm and egg donors were screened for genetic disease, underwent a physical and psychological examination, and submitted detailed personal information and their high school and college transcripts for review. To protect the privacy of the donors, no photographs were available, but the donor profile included information such as height, weight, eye, skin, and hair color, personal preferences such as hobbies, music, sports, art, etc., and a statement of any major illnesses of the donor or the donor's immediate family.

Bob and Sally agreed on an egg donor described by Mr. Rocca as a 130-pound, twenty-year-old, 5'7" woman with blond hair and blue eyes, who carried an overall 3.8 average in high school and college, plays the violin, is on the women's varsity swimming and soccer teams, and plans to pursue a doctorate in molecular biology. Mr. Rocca stated that eggs harvested from the donor would become the joint property of Bob and Sally. Bob and Sally signed a contract with the firm and gave Rocca a check for $10,000, which he said would cover his fee and the expenses relating to the egg extraction from the donor. Rocca said that the in vitro fertilization would be done by the Wentworth IVF Clinic and that they would be billed directly by the Clinic for those services.

Within a month, a fertility specialist under contract with the law firm extracted nine eggs from the donor. The eggs were cooled, sealed in a glass container containing a nutrient broth, and, within 24 hours after extraction, transferred to Wentworth IVF Clinic. The firm advised Bob and Sally that nine healthy eggs had been secured and, in accordance with the contract, had been transferred to the Clinic. Bob had previously supplied semen specimens to the Clinic and Sally had been taking hormone injections designed to maximize her retention of implanted embryos. Within two hours after receipt of the eggs, Wentworth technicians were able to fertilize six of them with Bob's semen. The other three were frozen and placed in storage.

A Wentworth official informed the couple that it was possible to genetically enhance the fertilized eggs, prior to implantation, in a number of ways. One way was treatment with an MDA stimulator, a protein enhancer that was designed to increase intelligence by promoting neural pathway development. The official advised that, although the technique was "incompletely tested, "in a study of 290 reports of its use, no negative side effects had been observed. The official said that the normal fee for the in vitro services was $15,000, that there was an additional cost for the MDA treatment of $3,000, and that the Clinic required a release from the couple. After discussion with Dr. Galen, Bob and Sally agreed to the MDA treatment, paid $18,000 to Wentworth, and signed a release absolving Wentworth and its officers, directors, employees, and stockholders of all liability. When informed that three of the zygotes were likely female and three were male, Bob and Sally agreed to have only the male zygotes implanted, as they wanted a son. After treatment with the MDA stimulator, three male zygotes were implanted into Sally.

Three weeks later, Dr. Galen detected one implanted embryo and declared Sally pregnant. The pregnancy was carefully monitored. A chorionic villus sampling test was conducted early and all results were favorable. Maternal alpha feto protein tests were negative. An amniotic fluid sampling test produced no contrary results. Gestation proceeded normally, and, within 280 days after implantation and after six hours of active labor, a seven-pound baby boy, Michael Robert Hopewell, was born. Dr. Galen supervised the delivery. Vital signs were normal. The only abnormality noted was a longer-than-normal head, in the 95th percentile of chin to crown axis length. No evidence of hydroencephaly was observed; the baby's ApGar Score was 8.0.

Bob, Sally, and Michael's pediatrician developed some concern when Michael's mental, speech, and walking milestones were significantly delayed. When Michael was two, he was diagnosed as having Fragile X Syndrome, with unknown impact on his mental development. The diagnosis was confirmed by chromosomal examination. A scan of Michael's brain revealed no remarkable or abnormal characteristics. Upon the pediatrician's recommendation, Michael was placed in an enriched day care environment with special emphasis on language stimulation and development, the cost of which is $10,000/year. Bob and Sally have since learned that Dr. Galen is a stockholder and director of Wentworth and that Mr. Rocca is also a stockholder in Wentworth. Those

(APPENDIX) *Continued frompage 8*

interests had not been disclosed earlier.

Bob, Sally, and, through his parents, Michael, have filed a multi-count lawsuit in the Circuit Court for Bupkus County, State of North Ambrosia, against Dr. Galen, Mr. Rocca, the firm of Rocca & Bye, and Wentworth, alleging negligence, breach of warranty, breach of contract, strict product liability, intentional infliction of emotional distress, and wrongful birth. They have sought extensive discovery, including the identity of the egg donor, whom they wish to sue and have genetically tested. Each of the defendants has sought an order requiring genetic testing of Bob and Sally to determine whether either of them was the source of the Fragile X Syndrome.

Issues for Discussion:

1. How does in vitro fertilization actually work? What is the process?
2. What are the current and future prospects for genetically altering sperm, eggs, zygotes, or embryos as part of the in vitro process:
   a. What is presently possible and what does the future hold;
   b. How is genetic alteration actually done or likely to be done;
   c. What are the prospects for genetic alteration producing unexpected results, and what kinds of unexpected results may occur?
3. What normative, scientific, or ethical standards exist with respect to:
   a. Recruiting, screening, advising, and compensating potential sperm and egg donors;
   b. Harvesting, storing, and protecting sperm and egg specimens from contamination, unauthorized altering, or other damage;
   c. Recruiting, screening, and advising potential sperm and egg donees;
   d. Relationships among the various legal and medical components of the process -lawyers, IVF clinics, gynecologists, donors, donees, others;
   e. Altering the genetic structure of the sperm, eggs, zygotes, or embryos?
4. What are the legal rights of donors and donees and, in the event of any marital discord, the spouses of donors and donees, with respect to the: (i) sperm or eggs, before and after fertilization; (ii) embryos; and (iii) children who develop from the embryos?
5. What actions may lie in this case scenario or various modifications of it?
6. What liability may exist, and to whom, on the part of a sperm or egg donor if the donor misrepresents any of the information supplied to the law firm?
7. What can properly be included in any release given to any of the participants?
8. What privacy rights do donors or donees have, in litigation or otherwise, and to what extent can privacy be protected by contract?

Case Study Problems Presented January 20, 2006

Case Study 1

Dr. Michaels, an investigator who studies stroke and neurological repair at a university hospital in Michigan, travels to California to collaborate with Dr. Caine, the head of an embryonic stem cell laboratory in San Francisco. Michigan prohibits somatic cell nuclear transfer; California permits the derivation of new human embryonic stem cell lines both using leftover embryos from fertility clinics and nuclear transfer-derived embryos. Drs. Michaels and Caine plan to do a series of experiments which involve using embryonic stem cell lines of three types: existing lines, newly derived lines from donated IVF embryos (IVF lines), and newly derived lines from nuclear transfer (NT lines). The existing lines were derived by a group in Massachusetts, the IVF lines will be derived by Drs. Michaels and Caine using embryos from California IVF clinics, and the NT lines will use eggs donated by healthy volunteers from California and fibroblasts donated by patients of a colleague of Dr. Caine's.

In preparing for these experiments, Dr. Michaels consults with his university Institutional Review Board (IRB) and Embryonic Stem Cell Research Oversight Committee (ESCRO), as well as his Dean of Research and Provost. The IRB and ESCRO must decide how to view Dr. Michaels' research proposal. The Michigan university must decide how to deal with their moral and legal responsibility in the face of state laws governing stem cell research. Finally, when Drs. Michaels and Caine submit their work to a prominent journal in the United States, the journal editors must gauge their responsibility in the face of this work, much of which is illegal in the home state of Dr. Michaels.

Discussion Questions

1. What is the difference between adult and embryonic stem cells?
2. Are stem cells from umbilical cord blood "adult" or "embryonic" stem cells?
3. How are adult stem cells isolated?
4. How are stem cells derived from IVF embryos?
5. Where and how do scientists get IVF embryos for embryonic stem cell research?
6. What is somatic cell nuclear transfer (SCNT)? How are stem cells derived from nuclear transfer "embryos"?
7. How are stem cells derived from nuclear transfer embryos different from stem cells derived from IVF embryos?
8. How is "therapeutic cloning" different from "reproductive cloning"?

Case Study 2

Doug Clark was in a motorcycle accident in 2002, when an SUV in an oncoming lane drifted across the double yellow line and into his lane. His spinal cord was crushed when he was thrown off his bike and into the windshield of the SUV. As a result, Doug is mostly paralyzed from the neck down (he is able to breathe on his own and shrug his shoulders), is confined to a wheel chair and must rely on others to help him with activities of daily living, such as washing, eating and dressing. He is able to use the internet, listens to books on tape, spends time with family and friends, and goes to physical therapy, but is unable to work. On the internet and in the news, Doug has heard about the promise of stem cell research. He learns through an online discussion group that there is a doctor in Maryland who is offering stem cell therapy for spinal cord injury and other conditions. He and his wife, Sara Clark, go to see Dr. Mansfield and learn that for $10,000 he will perform a series of injections of embryonic stem cells, but that they must all travel to a

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clinic in the Bahamas for the procedure. The Clarks decide to go through with the procedure and several weeks later, travel to the Bahamas, $10,000 check in hand, and meet Dr. Mansfield at the clinic. Doug and Sara go to the clinic every other day for two weeks for Doug's injections and then return to their home in Maryland to wait and hope for improvement. Several days after returning home, Doug develops tingling sensations in his fingertips. Over the next week he regains some control of his wrists and hands. A month later, while his improvement appears to have plateaued, he begins to develop memory problems, which rapidly progress to profound dementia. Six months after his stem cell injections, Doug Clark dies. Autopsy provided the diagnosis of a previously unknown spongiform encephalopathy, or prion disease. It is concluded that the stem cell injections were the likely source of the proteins that caused Doug's disease. Sara Clark begins the process to bring a wrongful death suit against Dr. Mansfield.

The stem cells that Dr. Mansfield used for Doug Clark's injections were derived from donated IVF embryos, by a group in the United States. As part of the derivation process, the stem cells were cultured using standard procedures, which include exposure to animal products. It is determined that the prions did, in fact, originate in the culture medium. Dr. Mansfield was not aware that such contamination was a risk. The group that derived the stem cells that were shipped to Dr. Mansfield did not know that Dr. Mansfield would be using the cells in patients.

Discussion Questions

1. Are embryonic stem cell-based therapies currently available?
2. Are adult stem cell-based therapies currently available?
3. What does it mean to "culture" stem cells?
4. Can both adult and embryonic stem cells turn into the nerve cells that Doug Clark would need to repair his spinal cord?
5. How do we deal with unknown risk? Liability for unknown risk?

New Members

John A. Andryszak
Jacqueline G. Badders
Peter J. Basile
Steffany K. Bender
Sandra Benzer
Elissa F. Borges
Brian W. Casto
Marc A. DeSimone, Jr.
Katherine D. Fones
James E. Garland
Jeffrey M. Geller
Elizabeth M. Greenwald
Tiffany C. Hanna
Benjamin A. Homola
Marian C. Hwang
John H. Johnson
Paul Keeler
Siobhan R. Keenan
Steven J. Kelly
Susan Durbin Kinter
Eric G. Korphage
Anthony W. Kraus
Karen J. Kruger
Tameika Lunn-Exinor
J. Stephen McAuliffe, III
William Joshua Morrow
Amy S. Paulick
Matthew J. Pavlides
Emily A. Piendak
Julie A. Reddig
Sarah B. Richardson
Laura L. Rose
Derek P. Roussillon
Douglas T. Sachse
Marsha K. Samuels
Susan H. Snively
Mark J. Stiller
James A. Sullivan, Jr.
Gerald W. Ueckermann, Jr.

Case Study Problem Presented January 21, 2006

It is now the year 2015. In the past three decades, there has been an explosion of research into the structure and functioning of the brain. In 2012, three researchers at the University of Middle California (UMC) published findings in Neuroscience, a highly respected scientific journal, that identified brain activity associated with a person's consciousness of falsehood. In 863 case studies in which subjects, while undergoing targeted brain scans, had been asked to give first knowingly truthful and then knowingly false answers to a series of questions, the UMC researchers were able to identify specific brain activity involved only when the subjects gave deliberately false answers. That activity was found to be involved 97% of the time when knowingly false answers were given and was absent 96% of the time when knowingly truthful answers were given. The research data supporting those findings has been peer-reviewed; three scientists from other research facilities were able to replicate the experiments, although one has been unable to do so.

In 2010, scientists in Belgium identified a particular kind of mutation of a specific gene that caused a significant impairment of impulse control and therefore, in the scientists' view, created a predisposition toward violent behavior. That conclusion, based on a study of over 400 persons in Belgium, France and Massachusetts with a documented history of criminal violent behavior, was published in three European scientific journals. Scientists at the University of Western Rhode Island (UWRI), studying 276 persons with that gene mutation, reported observing a specific abnormality in the cell structure of a particular part of the brains of 274 of those persons and concluded from that research that persons with the gene mutation would likely have the abnormality noted. Scientists at the University of South Carolina (UNSC), after conducting a study of 356 persons with a documented history of violent criminal behavior, reported in *American Neuropsychology*, a well-regarded journal, that 288 of those persons did not have the gene mutation but did have the brain abnormality noted in the UWRI study. Those scientists concluded that persons with that abnormality, whether or not resulting from the gene mutation, would have a predisposition to violence—that there might be other causes of the brain abnormality, but that it was the brain abnormality, rather than the gene mutation, that created the impulse control impairment and therefore the predisposition toward violence.

Floyd Mennis was charged in the

(APPENDIX) *Continued from page 10*

Superior Court of the State of Ambrosia with the murder of a 14-year old girl. The State's evidence would show that Mennis abducted the victim from her home at knifepoint, dragged her to his car, raped her, and then brutally stabbed her to death. The State sought the death penalty. Ambrosia law permits a jury to impose the death penalty if it finds that the victim had been abducted or that the murder was committed in the course of the rape. The law requires the jury to consider certain mitigating factors; however, one of which is the unlikelihood that the defendant would engage in any further violent criminal behavior.

Mennis, 22 years old, had been before the juvenile court on a number of occasions, first as a neglected child and later as a delinquent child. When before the court in the neglect case, at the age of eleven, he had already exhibited a history of antisocial and other bizarre behavior and the court had a concern as to whether there were any pathological mental health issues. With the consent of his court-appointed attorney and in an effort to devise an appropriate treatment plan and disposition, the court ordered extensive psychological testing. The psychologist requested, and the court ordered, certain neuroimaging tests to assist in a proper diagnosis. The neuroimaging test revealed the particular brain abnormality noted in the UWRI and UNSC studies, although, because the test was conducted prior to the publication of those studies, the revelation was not recognized as an abnormality. It was therefore not regarded as significant for purposes of the juvenile court proceeding and was not mentioned by any of the parties or the court. The test result showing the abnormality was admitted into evidence in the juvenile proceeding; however, as part of the psychologist's report to the court and remained in the juvenile court file.

Prior to trial, defense counsel arranged for Mennis to have a brain scan of the type used in the UMC study. In the controlled environment, Mennis was asked all of the questions counsel proposed to ask on direct examination, in order to establish that Mennis did not commit the crimes. He filed a motion *in limine* to permit him to call both the persons who conducted the neuroimaging examination and a neuroimaging psychologist to testify regarding the nature and reliability of the test and to the test results showing that there was no knowing falsity in Mennis's answers. Counsel proffered that the evidence would show that, unlike polygraph examinations, this test was scientifically reliable. The State objected.

The State, independently, moved *in limine* to admit the neuroimaging evidence from the juvenile court proceeding at the sentencing phase of the trial, in the event Mennis was convicted. The prosecutor stated that the evidence would be relevant to negate the mitigating factor of whether Mennis would likely engage in future violent criminal behavior. She said that she would call witnesses to authenticate the documents and to establish the reliability of the various studies. The State moved as well to require Mennis to undergo another brain scan of that type, to confirm the brain abnormality as of the present time. Mennis, of course, objected to both motions.

How should the judge rule on these motions?

Issues for Discussion:

1. What are the prospects for neuroimaging to produce this kind of evidence—lie detector evidence, evidence of an impairment of impulse control/propensity for violence, or evidence of other character traits that might be relevant in a criminal or civil case?
2. Assuming neuroimaging could produce this kind of evidence, how would its reliability be established under either *Daubert* or *Frye*? Are there any group (gender, race, etc.) or individual factors likely to affect reliability when the laboratory test results are applied to an individual?
3. What are the various neuroimaging processes and techniques: how do they work, what are they designed to determine?
4. What ethical standards, if any, govern neuroimaging examinations and the disclosure and use of the results?
5. What Fourth, Fifth, or Sixth Amendment issues may arise with respect to the State's use of neuroimaging results? To what extent can neuroimaging results be regarded as communicative or testimonial in nature? Could the State, arguing that neuroimaging results are no different than other physical evidence that may be involuntarily extracted from the accused—fluid or tissue samples to be subjected to DNA or chemical analysis—insist that Mennis undergo a scan of the type undertaken by the defense in order to develop incriminating evidence?
6. Can the brain abnormality disclosed in the evidence presented to the juvenile court be regarded as "incidental" in nature? What ethical and legal rules should govern the use of incidental findings?
7. Would the admissibility of the brain scan conducted for the juvenile court be different if it showed no brain abnormality and was offered by Mennis?

MARYLAND GENERAL ASSEMBLY UPDATE

Delegate Sandy Rosenberg and Senator John Giannetti introduced bills in the House (HB 254) and Senate (SB 677), respectively, in an effort to have the post-judgment interest rate tied to a market rate index instead of the rate remaining constant at 10%. This is the second year of the initiative, although this year the rate chosen was the prime rate, slightly higher that the constant maturity yield proposed last year and bond forfeitures were excluded at the court clerks' suggestion. The bill was dropped in the Senate after an unfavorable report from the House Judiciary Committee, but progress was made. Thanks to Immediate Past President Gardner Duvall for his continued leadership on this measure.

Governor Ehrlich has introduced an omnibus medical malpractice reform bill (HB 306 and SB 229) called the Maryland Medical Injury Compensation Reform Act. MDC intends to support the bill. Key portions of the bill include:

- Beefing up the Certificate of Merit

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MARYLAND GENERAL ASSEMBLY UPDATE—CONTINUED

criteria to weed out professional witnesses
- Allowing introduction of collateral source evidence, offset by evidence of the cost of obtaining the coverage and any subrogation claims, if the defendant will underwrite the future care in the event the coverage disappears in the future
- Providing for a neutral expert on damages at the cost of the moving party
- Providing for a total cap on non-economic damages of $500,000
- Valuing past medical expenses at their third-party payor rate, not "retail" or "balance bill" rate
- Reducing lost wage claims to account for taxes that would have been owed
- Valuing future medical expenses at the Medicare rate (Medical Assistance for nursing homes) or, if no such rate is applicable, at the rate a plaintiff has historically paid for such expenses in the past. All would be subject to adjustment for inflation at the five year average of the consumer price index for the category of service rendered
- Introducing a *Daubert* analysis for scientific testimony, including an evidentiary hearing as necessary
- Making certain kinds of apology evidence inadmissible
- Indexing post-judgment interest to a market rate
- Establishing a task force to examine other related issues such as patient safety, periodic payments, etc.

Other legislators have introduced individual bills with some of these provisions, including Delegates Zirkin and Morhaim. Although none of these reforms is expected to have much chance of passing or even receiving a favorable report from the Judiciary Committee, MDC feels that it is important to be on record in support of these measures.

House Bill 82, an effort to abrogate the requirement in Maryland Rule 2-305 that a monetary damages amount be pled in a civil complaint if certain jurisdictional, forum and other procedural representations were made by a claimant, was reported unfavorably by House Judiciary.

Other bills that may be of interest to MDC members include bills involving:

- Limitation on non-economic awards in latent disease cases;
- A Constitutional Amendment to bar jury trials in cases at or below $10,000.00;
- Changes in the manner of election of circuit court judges;
- Many proposals affecting and encouraging jury service;
- A proposed commission to study electronic filing;
- A proposed task force on administrative compensation of birth related neurological injury;
- Medical malpractice administrative review boards;
- Tax credit for medical malpractice insurance;
- Permitting community associations to institute nuisance actions for money damages based on the presence of lead paint, imposing market share manufacturer liability for lead paint damages and changing lead paint abatement provisions;
- Disclosure and investigations of (and fees for) medical records;
- Good Samaritan immunity and changes in standard of proof for emergency medical care malpractice;
- Limits on amount of appeal bonds and expedited appeals;
- Extensions of statutes of limitation on and filing of child sexual abuse actions; and
- Appeals to the Court of Special Appeals from Circuit Court In Banc.

SPOTLIGHTS

Kristine A. Crosswhite and Susan E. Smith of Crosswhite, Limbrick, & Sinclair, LLP had a recent victory before the Court of Special Appeals in *Sindler v. Litman*, No. 1838, September Term, 2004 (December 2, 2005). In affirming the trial court's decision, the Court of Special appeals held that (1) suicide did not support plaintiff's action for wrongful death (an issue of first impression in Maryland); and (2) post-verdict dismissal was an appropriate sanction for plaintiff's repeated discovery abuses. The *Sindler* case arose from a rear-end collision that occurred on December 7, 1994. After the accident, Mrs. Sindler was transported to a local hospital, where she was treated symptomatically and released.

The litigation commenced in November 1997 when Mrs. Sindler and her husband filed a Complaint in the Circuit Court for Baltimore County. The Complaint included a general negligence claim on behalf of Mrs. Sindler and a loss of consortium claim on behalf of both Dr. and Mrs. Sindler. Summary judgment on the issue of liability was entered in the plaintiffs' favor prior to trial.

Although the parties engaged in some discovery, the progress of the case was severely limited by Mrs. Sindler's ongoing medical treatment by dozens of health care providers throughout the United States for injuries allegedly related the accident. Mrs. Sindler had initially complained primarily of minor orthopedic injuries, however, her claims evolved through the course of litigation to ultimately included complaints of traumatic brain injury leading to severe cognitive impairment.

In early July 2004, the defendants filed a motion to dismiss the entire case pursuant to Md. Rules 2-432, 2-433, and 2-311, arguing that dismissal was an appropriate sanction for the plaintiffs' continued and repeated abuse of discovery by failing to appear for a properly noted second deposition to which the plaintiffs' counsel had consented; failing to respond to Requests for Admission of Fact; failing to produce medical records and bills; failing to appear for independent medical examinations; and, failing to provide executed Answers to Interrogatories despite an order compelling said discovery. The trial court reserved its ruling on the motion.

On July 5, 2004, the plaintiffs' counsel disclosed that Mrs. Sindler

SPOTLIGHTS—CONTINUED

had committed suicide. On July 16, 2004, nearly seven years after the original Complaint was filed and nearly ten years after the motor vehicle accident, Dr. Sindler, individually and as the personal representative of Mrs. Sindler's estate, filed an Amended Complaint asserting a wrongful death claim and a survival action. In the Amended Complaint, Dr. Sindler alleged that Mrs. Sindler committed suicide as result of irreparable and catastrophic physical and mental injuries arising from the accident.

The defendants filed a motion to dismiss the wrongful death claim, arguing that under Maryland law suicide is not a legally cognizable basis for a wrongful death action in the absence of a special relationship, and that the plaintiffs had failed to present sufficient evidence to support such a claim under any of the three theories of liability recognized by other jurisdictions that had considered the issue. The plaintiffs filed an opposition, arguing that the evidence established that Mrs. Sindler was rendered insane as a result of the injuries sustained in the accident, and that the alleged suicide was a foreseeable result of the accident. The plaintiffs attached deposition transcripts to their opposition, and so the motion to dismiss was converted to a motion for summary judgment pursuant to Md. R. 2-322(c).

The Circuit Court for Baltimore County issued an order granting the motion, holding that the wrongful death claim could not be maintained because of the ten-year separation between the motor vehicle accident and the alleged suicide; the lack of a finding that Mrs. Sindler was legally insane; her continued participation in normal life activities during the ten-year period following the accident; and the lack of foreseeability.

The trial proceeded solely on the issue of damages. At the close of the plaintiffs' case and at the close of all of the evidence, the defendants moved for judgment under Md. Rule 2-519 and renewed their motion to dismiss. On the first occasion, the trial court denied the motion for judgment and reserved ruling on the motion to dismiss. On the second occasion, the trial court reserved decision on both motions, and submitted the case to the jury. Following deliberations, the jury returned a verdict in favor of Dr. Sindler in the amount of $28,000 for non-economic damages, and $10,000 for loss of consortium.

Shortly after the jury returned its verdict, the trial court held a hearing on the reserved motions and granted both of them. In a Memorandum Opinion explaining the reasons for the ruling, the trial court stated that it was particularly troubled by the plaintiffs' failure to make Mrs. Sindler available for an update deposition despite repeated requests from the defendants' counsel and assurances from her counsel that she would voluntarily appear. The trial court also expressed concern about the fairness to the defendants of having to conduct trial without having had an opportunity to question Mrs. Sindler about the extensive medical treatment she received between her deposition in 2000 and her death in 2004, which made up the vast majority of the damages that were testified to at trial, and her travel, business, and social activities during that period; without having received executed Answers to Interrogatories; and without having had an opportunity to cross-examine Mrs. Sindler with respect to statements made to treating physicians concerning her history and condition, in a case where the claimed injuries were subjective in nature and her statements formed the sole basis for her doctors' diagnoses.

Although the trial court acknowledged that the plaintiffs had produced evidence of non-economic damages, it ultimately concluded that the extreme prejudice to the defendants stemming from the plaintiffs' discovery abuses warranted reversal of the jury's verdict and dismissal of all of the plaintiffs' claims.

The plaintiffs appealed the Circuit Court decision and on December 2, 2005, in a reported opinion, the Court of Special Appeals affirmed the Circuit Court. *Sindler v. Litman*, 887 A.2d 97 (2005). The Court of Special Appeals adopted the analysis set forth in Section 455 of the *Restatement (Second) of Torts*. Section 455 provides that a wrongful death action may lie where the wrongful act is found to have caused delirium or insanity in the decedent, which in turn leads to an uncontrollable impulse to commit suicide or prevents the decedent from realizing the nature of his or her act. The Court ultimately affirmed the lower court's entry of summary judgment in the defendants' favor, concluding that there was insufficient evidence that Mrs. Sindler was insane and suffering from an uncontrollable impulse to commit suicide or could not realize the nature of her act.

The Court of Special Appeals also affirmed the trial court's post-trial ruling granting the defendants' motion to dismiss, holding that the plaintiffs' failure to provide executed Answers to Interrogatories after a order compelling discovery had been entered and refusal to submit to a re-deposition after having agreed to do so was sufficient grounds for the trial court's imposition of the "ultimate sanction" of dismissal.

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American Roll-On Roll-Off Carrier, et al. v. P&O Ports Baltimore, Inc., U.S. District Court for the District of Maryland, Civil Action No.: WDQ-03-cv-3462

On December 9, 2005, JoAnne Zawitoski and Alexander M. Giles of Semmes, Bowen & Semmes were successful in obtaining summary judgment for their stevedoring company client, P&O Ports Baltimore, Inc. in a case involving a five million dollar claim for damage to a cargo of automobiles being shipped from the Port of Baltimore to Europe. The Complaint alleged that P&O, which was responsible for loading cargo onto the vessel M/V FAUST in Baltimore in 2000, had improperly secured a tow truck in the hold of that ship. After the vessel sailed from Baltimore, it encountered a gale force storm in the North Atlantic that caused the ship to pitch and roll violently. During that storm, the tow truck came loose from the lashings securing it and began to roll around on one of the vessel's underdecks. Eventually, the rolling tow truck pierced an interior bulkhead or wall of the ship, causing hundreds of gallons of diesel

SPOTLIGHTS—CONTINUED

fuel to spill out. The diesel fuel dripped down onto the deck below, and onto some used automobiles being shipped by the military to Europe for the benefit of service members stationed there.

The Plaintiffs were Wallenius-Wilhelmsen Lines and two of its affiliated companies, who were the owners and operators of the ship. Wallenius claimed that 125 or so of those cars were a total loss. Wallenius and the other plaintiffs had paid five million dollars for the damaged cars to the individual service members who owned the cars.

JoAnne and Alex filed a motion for summary judgment arguing that P&O Ports' liability was governed by the Carriage of Goods by Sea Act, 46 U.S.C. 1300 et seq., which either limited P&O's liability to $500 per car, or else the claim was time-barred because it had not been brought within one year of the date of delivery of the cars, as required by the Act. On December 9, 2005, Judge Quarles granted P&O Ports' Motion for Summary Judgment, finding that the Carriage of Goods by Sea Act governed the claim and that Wallenius' claim was time-barred under that Act. As a result, Wallenius and the other plaintiffs took nothing on their five million dollar claim, and the motion resulted in a complete victory for the defense.

Goin v. Shoppers Food Warehouse Corporation, No. 923, September Term 2004, is an appeal of the decision of the Circuit Court of Prince George's County in a two count "business premises slip and fall case" including a negligence claim (Count I) and "spoliation" of evidence claim (Count II). The Circuit Court entered summary judgment in favor of Shoppers on Count I and dismissed Count II. On appeal the Court of Special Appeals considered whether the Circuit Court erred in (1) holding that spoilation of evidence was not applicable in this case and (2) dismissing the claim that spoilation of evidence is an independent tort. The Court of Special Appeals affirmed the judgment of the circuit court and answered both questions on appeal in the negative.

As to the first question on appeal, the Court held that the evidence on record was legally insufficient to generate a genuine dispute of fact on the issue of whether the "clean up" of the floor by a Shoppers' employee after Goin's fall constituted "fraudulent conduct aimed at suppressing or spoilating evidence." *Meyer v. McDonnell*, 40 Md. 524, 530 (1978). The Court instructed that in the absence of evidence that the employee cleaned the area where Goin fell because "he or she (1) was instructed—on that particular occasion, on a prior occasion, by written instruction to employees, or by any other communication—to 'get rid of whatever you find on the floor in the vicinity of the fall,' and/or (2) acted pursuant to a company policy that provides for retention of items that would be helpful to prove that the plaintiff was guilty of contributory negligence or assumption of risk," summary judgment was correct as a matter of law.

The Court further opined that recognizing spoilation as a separate and collateral tort is "for the Court of Appeals or the General Assembly to determine." In addressing the second question, the Court agreed that it "should not adopt a remedy that itself encourages a spiral of lawsuits, particularly where sufficient remedies, short of creating a new cause of action, exist for a plaintiff." *Dowdle Butane Gas Co., Inc. v. Moore*, 837 So.2d 1124, 1135 (Miss. 2002). Thus, the doctrine of "spoilation" does not give rise to an independent cause of action.

Joseph W. Hovermill, Matthew T. Wagman, and John C. Celeste of the Baltimore office of Miles & Stockbridge P.C. recently obtained landmark rulings in the Fourth Circuit Court of Appeals and the United States District Court for the District of Maryland. Specifically, in *Discover Bank v. Vaden*, 396 F.3d 366 (4th Cir. 2005), the Fourth Circuit held that a federal court would have jurisdiction over a motion to compel arbitration under the Federal Arbitration Act ("FAA") if the underlying dispute contained a federal question.

The Fourth Circuit was faced with the issue of when a federal district court has the authority to hear a motion to compel arbitration under the FAA. The Fourth Circuit chose not to adopt the narrower *Westmoreland* doctrine, which states that in order for a federal district court to have federal question jurisdiction over a suit compelling arbitration, the federal question must be present in the arbitration petition itself. The courts following this approach conclude that, because this is unlikely, federal question jurisdiction will essentially never provide the basis for a court's subject matter jurisdiction over such a motion. Accordingly, under this approach, which the majority of jurisdictions follow, federal jurisdiction over such a motion is almost certainly precluded unless there is diversity of citizenship. Instead, the Fourth Circuit adopted the broader approach, which allows district courts to examine the underlying dispute to determine whether a federal question exists. The court found the minority approach to be consistent with the language and purpose of the Federal Arbitration Act.

On remand from the Fourth Circuit, in an opinion dated January 18, 2006, United States District Judge William D. Quarles determined that a federal question existed in the underlying dispute between the parties because federal law preempted the defendant cardholder's state-law counterclaims. As a result, the court held Discover Bank was entitled to pursue its motion to compel arbitration in the federal district court.

Discover Financial Services, Inc. ("DFS") initially filed suit against Betty E. Vaden in a Maryland state court for nonpayment of over $10,000 of her credit card balance. When Vaden responded with state-law counterclaims against DFS alleging illegal assessment of finance charges, late fees and interest rates, Discover Bank and DFS filed a petition in the federal district court to compel arbitration of the claims.

Discover Bank and DFS argued that the federal court had subject matter jurisdiction because the Federal Deposit Insurance Act ("FDIA") completely preempts claims concerning fees and interest rates charged by national banks. Vaden conceded that the FDIA preempts claims against a federally insured bank, such as Discover Bank, but not against non-bank servicing entities, such as DFS.

In reaching the conclusion that the FDIA completely preempts Vaden's state-law counterclaims, Judge Quarles found that Discover Bank, not its servicing affiliate was the real party in interest. "Complete preemption applies," wrote the judge, "when a party seeks recovery for excessive fees and interest loans that were made by a national bank, even if the bank is not named as a party." As a result, Judge Quarles ordered arbitration of the counterclaims.

The case is currently back before the Fourth Circuit on appeal of Judge Quarles's January 18, 2006 opinion.

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THE DEFENSE LINE

A Publication from The Maryland Defense Counsel
1218 Broadway Road
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www.mddefensecounsel.org