THE DEFENSE LINE

A Publication From The Maryland Defense Counsel, Inc.

Summer 2004

Important Announcement

Mark your calendars now for the joint **MDC/MTLA Golf Tournament** October 1, 2004

Visit us on the Web at mddefensecounsel.org for details

Bozman v. Bozman

Abrogation of Interspousal Immunity and the Law of *Res Judicata*

By Jack Condliffe

In 2003, Maryland became the 38th state to fully abrogate the doctrine of interspousal immunity. The doctrine of interspousal immunity in tort cases prevents a married woman from maintaining a tort action against her husband. *Bozman v. Bozman*, 376 Md. 461, 469 (2003). This doctrine dates back to the dawn of European and Christian civilization with roots found in the Bible in St. Paul's letters dealing with the unity of husband and wife. This biblical passage formed the basis for the legal principle of the loss of a woman's legal identity when she married. Blackstone's Commentaries on coverture and the legal relationship between husband and wife constitute modern re-statements of this common law principle which pre-dates written common law decisions in England:

> *By marriage, the husband and wife are one person in the law: that is, the very being of legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything; and is therefore called in our law-french a feme-covert, foemina viro co-operta; is said to be a covert-baron, or under the protection and influence of her husband, her baron, or lord; and her condition during her marriage is called coverture. Upon this principle, of a union of person in husband and wife, depend almost all the legal rights, duties and disabilities, that either of them acquire by the marriage.*

1 W. Blackstone, *Commentaries* 442, 443. Blackstone goes on to discuss the right of a husband to inflict corporal punishment upon a wife, tempered under the law because of the love the English have for women. *Bozman*, 376 Md. at 469, 830 A.2d at 455.

In *Bozman*, the Court of Appeals conducted its analysis by focusing on the antiquated nature of the principal of interspousal immunity. The Court rejected, with thorough analysis, the five arguments presented by Ms. Bozman for retaining the law: (1) Husbands and Wives are Treated Differently by the Law; (2) Status of the Doctrine in other States; (3) Other Remedies [are available]; (4) Stare Decisis; and (5) *Boblitz v. Boblitz*, 262 Md. 242, 462 A.2d 506 (1983), [Should not be a springboard for abrogating as to intentional torts because insurance is available in negligence torts]. The Court held, "[j]oining many of our sister States that have already done so, we abrogate the interspousal immunity rule, a vestige of the past, whose time has come and gone, as to all cases alleging an intentional tort." *Bozman*, 376 Md. at 497, 830 A.2d at 471.

Besides the Court's historical analysis, *Bozman* specifically may be cited for three propositions:

A) The abrogation of interspousal immunity applies to causes of action accruing after the date of the opinion, August 12, 2003 (*Bozman*, 376 Md. at 497, 830 A.2d at 471);

B) The case provides the most recent case law on stare decisis (*Bozman*, 376 Md. at 491-496, 830 A.2d at 468-470); and

C) The Court of Special Appeals decision, reversed based on the court's abrogation of interspousal immunity, stands as good law on the legal definition of outrageous conduct, relevant to the tort of Intentional Infliction of Emotional Distress and other situations (*Bozman v. Bozman*, 146 Md. App. 183, 198-99, 806 A.2d 740 (2002) , *rev'd on other grounds*, 376 Md. 461, 830 A.2d 450 (2003), cited in *Carter v. Aramark Sports & Ent. Serv., Inc*, 153 Md. App. 210, 248, 835 A.2d 262, 284 (2003).

The abrogation of interspousal immunity carries with it, for family law practitioners, issues concerning case strategy, procedure, issue preclusion and a new realm of advice owed to clients. This article will address questions of when to file a tort action in juxtaposition to a divorce action. This article will not address the second conundrum posed by *Bozman*, which is what portion of any tort award

Continued on page 7

President's Message

Ahh. The lazy, hazy days of summer. Sometimes there is real value to a cliché! Generally, summer is a time for slowing down and reflecting. For MDC, though, summer is only a small respite. The Executive Committee and officers are hard at work, (sporadically, though!) reviewing our progress and planning for the coming year. My year as President has been very challenging and very rewarding. The best part has been hearing from and communicating with many members around the state whom I had not previously met. The second best part has been to see our efforts to increase services to our members and raise the profile of MDC in the legal community come to real fruition. And those efforts have just begun.

Margaret Fonshell Ward, Esquire

Moore & Jackson, LLC

As in closing argument, it's often a good idea to revisit what you said you planned to do and see if you accomplished that with evidence. We've done pretty well. My first and most significant goal was to offer more tangible and valuable services to our members. As I hope you have both seen and used, our web site is looking great. There are more opportunities for find information about members and assistance from members in other parts of the state. If your expanded information isn't there yet, please get it to Kathleen Shemer, so that you can become a resource to your fellow members. By far the most active expansion has been the use of our email exchange for expert inquiry and communication of important information. The web site also now contains useful links for several practice areas, including employment and labor law, workers compensation, professional liability, and others.

Here it is—a second *Defense Line* in six months! Hard to believe, but this was a commitment from Alex Wright and Matt Wagman and they have lived up to it. They will be continuing to not only publish regularly, but are well on their way to making this a stellar publication. Want you name in print? Want to show your colleagues and clients your brilliance? Write an article. There is lots of room to get it in Defense Line and we'd love to have it.

I also promised a new look and a strong message of who and what MDC is to the entire defense community. We're still working on the new look, which should be rolled out in 2005. We have the message, though. Our Mission Statement is here in this issue and we'll be working from this in designing our message to the public and the bar from all of the activities of the MDC committees.

The second goal was to increase our voice in judicial selections throughout the state and we have definitely been successful there. Our Judicial Selection Chairs, John Sweeney and John Sly have been tireless in this effort. They have put together more than a dozen interviewing panels, have weathered a number of storms concerning candidates, and have shepherded our recommendations through direct channels of communication to the Governor. One satisfying result has been the appointment of many of the candidates MDC has recommended, including MDC member Edward Murphy, soon to join the District Court for Baltimore County. Congratulations to Ed and may we continue to have success in establishing a distinguished and accomplished bench around the state. One last reminder on Judicial Selections - we absolutely need you. MDC must have active, concerned members to interview judicial candidates. When the call comes to you to join a panel, please say yes. It is a small contribution with a large and long lasting result.

The third goal was to continue our significant presence in the General Assembly's consideration of bills important to our constituent members and clients. As you all know, this past session presented many challenges for our members. The proposed medical malpractice reform bills raised difficult and sometimes divisive opinions and consequences. Those will be back next year, undoubtedly accompanied by other bills that may have a grave impact on our clients and the Maryland legal climate as a whole. Dan Moylan and David Godwin were dedicated to making sure MDC was covered at hearings important to the group and that we were informed about the progress of bills. Next session, since Dan has moved into an officer position, Dave will be joined by Kevin Murphy to continue making MDC a presence in Annapolis. We have a lot of ideas for expanding that effort, including involving all of you. Look for a survey coming soon that asks about your connections to an interest in the legislative processes. We are also looking into an effective way to let members know more quickly what bills are being introduced, so that we can get your input on those bills to work into the lobbying program.

Finally, it was my goal to expand the membership of MDC across the state. We're getting there, but this continues to be an area needing more attention and will continue to be a focus of the coming year. If you know someone practicing defense law in the western part of the state, the Eastern Shore, and some of the D.C. Metro and Southern Maryland counties, and you suspect he or she may not be a MDC member, please let us know. Even those of us primarily located in the Baltimore metro area practice law in other counties and our clients often have interests across the state. We need to know and hear the voices of lawyers in those regions, so that we can improve the legal atmosphere across the whole state.

There are some phenomenal programs on tap for the coming year, both educational and fun. These will include a day long program on the jury system in Maryland and a golf tournament. Both of these will be sponsored along with MTLA, in the continuing effort to build more bridges with our counterparts. Much more is planned we hope to send an outline to you by end of summer. All of our efforts will need volunteers and I urge you to let us know if you want to get active and involved. Recently, two members have jumped right up to ask for jobs. Our response? Great! Here it is! Don't be shy—if we haven't come directly to you yet, come to us. In order for MDC to remain a vital and growing organization, we need to keep getting new, committed people involved. I hope that you will be one of them.

As a final thought, I want to offer my enduring thanks to all who have supported my plans and goals and efforts in my year as President, especially the dedicated Board. I was confronted with several thorny and controversial issues. When I sought consensus from the Executive Committee, I nearly always got it, with good humor, grace, and exquisite professionalism. On the rare occasions that I needed to call a vote or make an executive decision, I was completely supported in that call. The response I got back from members across the state to all that we accomplished this year was prompt and effective. I'll go forward as a real champion of MDC, encouraging all of you to experience the value to be had as an active member.

United States Supreme Court Rules That State Tort Claims Arising From Denials Of Health Insurance Benefits Are Preempted By ERISA

By Jennifer S. Lubinski

In *Aetna Health, Inc. v. Davila*, No. 02-1845, 2004 U.S. LEXIS 4571 (June 21, 2004), the United States Supreme Court ruled that state law claims alleging negligent coverage decisions by employee benefit plans are completely preempted by the Employee Retirement Income Security Act ("ERISA"). The decision overruled the Court of Appeals for the Fifth Circuit, which had allowed state tort claims for remedies not otherwise authorized under ERISA.

In *Davila*, Juan Davila and Ruby Calad brought suit under Texas law alleging that their ERISA-regulated plan administrators failed to exercise ordinary care in the handling of their coverage decisions. Davila alleged that his plan refused to pay for Vioxx, prescribed by his physician for arthritis pain. Davila instead took an alternative medication and suffered a severe reaction that required hospitalization.

Calad's plan administrator certified her for only one day of post-surgical hospitalization following a complicated hysterectomy. This action was taken against the advice of her physician and, as a result, Calad suffered serious complications after discharge and required re-hospitalization.

Both Plaintiffs brought their respective suits in state court under the Texas Health Care Liability Act ("THCLA"). The THCLA imposes tort liability on health insurance carriers, health maintenance organizations (HMO's), and managed care entities that fail to exercise ordinary care when making health care treatment decisions that control or influence the course of treatment. The THCLA requires employees and agents of these entities to exercise the standard of care of a "person of ordinary prudence in the same profession, specialty, or area of practice." Similar laws, designed to address the perceived gap between the ERISA protections afforded to benefit plans and the harm to patients arising from treatment decisions made by those plans, have been enacted in Arizona, California, Georgia, Maine, New Jersey, North Carolina, Oklahoma, Washington and West Virginia.

According to Davila and Calad, as well as many physicians and other members of the health care industry, the remedies provided by ERISA do not "make whole" a patient who has suffered complications because of a benefit denial. For example, ERISA § 502(a)(1)(B) allows a plan participant or beneficiary to bring suit "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." Therefore, under ERISA, Davila might have paid for the Vioxx his physician prescribed out of his pocket, then brought suit against his insurer to recoup his costs. Likewise, Calad might have sought an

Continued on page 4

Editor's Corner

This edition of *The Defense Line* features a lead article from Jack Condliffe, discussing the case of *Bozman v. Bozman* where the Maryland Court of Appeals rendered a decision making Maryland the 38th State to eliminate the doctrine of interspousal immunity in tort cases. We also are fortunate to have two additional articles written by our MDC colleagues, including one from Alexander Wright, Jr. of Miles & Stockbridge P.C., who analyzes Senate Bill 243, which expands upon the basic principles set forth in Maryland's Uniform Arbitration Act. The last article written by Jennifer S. Lubinski of Lord & Whip, P.A., examines the case of *Aetna Health, Inc. v. Davila*, where the United States Supreme Court ruled that state law claims alleging negligent coverage decisions by employee benefit plans are completely preempted by the Employee Retirement Income Security Act.

Finally, as many of you know, the Defense Research Institute's 2004 Annual Meeting is taking place from October 6, 2004 through October 10, 2004 at the New Orleans Marriot in New Orleans, Louisiana. The program, available on DRI's web site (http://www.dri.org), is going to be fantastic, particularly with speaker Ben Stein, formerly a trial lawyer, law professor, and speech writer for Presidents Nixon and Ford, a debate on civil justice reform between Walter Dellinger, III of O'Melveny & Myers, L.L.P. and Todd Smith, President of the Association of Trial Lawyers of America, and countless other 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 Maryland Defense Counsel enjoy both the new look and the new features of *The Defense Line*. In the 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 the Editors, Alexander Wright, Jr. (410) 823-8250 or Matthew T. Wagman (410) 385-3859.

Editorial Staff

Alexander Wright, Jr.—Miles & Stockbridge P.C.
Matthew T. Wagman—Miles & Stockbridge P.C.
Kathryn M. Widmayer—Miles & Stockbridge P.C.
Michelle J. Dickinson—Piper Rudnick L.L.P.

(ERISA) *Continued from page 3*

emergency injunction ordering her insurer to approve a lengthier hospital stay. Either might have sought a ruling clarifying their rights to similar benefits in the future. None of these remedies, however, addressed the injuries Calad and Davila allegedly suffered because they complied with their insurers' recommended courses of treatment. They argued that state causes of action filled this "vacuum," and reflected the appropriate state regulation of citizen's health and welfare and of insurance.

Davila and Calad's suits were removed to Federal District Court and dismissed as preempted when the plaintiffs refused to amend their complaints to include ERISA claims. The United States Court of Appeals for the Fifth Circuit reversed the dismissal, holding that, because they did not seek an ERISA remedy, Plaintiff's claims fell outside of ERISA's scope and were not preempted.

The Supreme Court disagreed. In an opinion authored by Justice Thomas, the Court held that state causes of action, such as the THCLA, were completely preempted by ERISA because they conflicted with ERISA's "comprehensive liability scheme." That scheme includes a set of enforcement mechanisms that would be undermined if plan participants and beneficiaries could obtain different remedies under state law. Under this ruling, if an individual is injured by a denial of coverage for medical treatment and the only basis for that coverage is an ERISA-regulated plan, the suit falls within ERISA's scope and is preempted, provided that no independent legal duty was breached.

According to the Court, state statutes such as the THCLA do not impose legal duties independent of ERISA's because any finding of liability under those statutes would be predicated upon a finding that the plan provided coverage for disputed treatment. For example, if a policy specifically excluded coverage for appendectomies, any injury caused by the refusal to cover an appendectomy would arise from the terms of the policy itself, not from any negligence of the insurer in applying the terms of the plan. On the other hand, state tort liability would be imposed if the plan provided coverage for appendectomies, but the plan administrator negligently refused to authorize an appendectomy for a participant who went on to suffer injury. The interpretation of the plan itself forms an essential part of state law claim, and is thus preempted by ERISA, which seeks to prevent the mingling of state law and federal regulation present in this case. According to the court, this overlap occurs even if a state cause of action offers different remedies or requires different proof of facts than an ERISA claim. Finally, the Court expressly declined to decide whether ERISA's provision for "appropriate equitable relief" under § 502(a)(3) might allow some compensation for injuries caused by benefit denials because Davila and Calad had refused to amend their complaints to allege any ERISA claims.

> "…if an individual is injured by a denial of coverage for medical treatment and the only basis for that coverage is an ERISA-regulated plan, the suit falls within ERISA's scope and is preempted…"

Justice Ginsburg, joined by Justice Breyer, wrote an interesting concurring opinion in which she joined "the rising judicial chorus urging that Congress and [the Supreme] Court revisit what is an unjust and increasingly tangled ERISA regime." The Justices called for a reconsideration of the availability of consequential damages under ERISA for injury caused by negligence in coverage determinations. The Court also noted that claims for "make-whole" relief against plan *fiduciaries*—entities with discretionary authority over benefits determinations—might be "fruitfully pursue[d]" in the future, and anticipated confirmation of the availability of "make-whole" relief by Congress.

Jennifer S. Lubinski is an associate at Lord & Whip, P.A. She concentrates her practice in health care and insurance coverage litigation and in the defense of general liability matters.

MARYLAND DEFENSE COUNSEL, INC. MISSION STATEMENT

Maryland Defense Counsel is an organization of attorneys devoting the majority of their professional efforts to defending civil lawsuits. We protect the rights of individuals and businesses facing challenges in the courts. Maryland Defense Counsel endeavors, through political activism, judicial candidate interviews, and educational conferences, to attain equal justice for all, improve Maryland's courts, strengthen the fabric of Maryland's economy and communities, and improve the defense of civil lawsuits.

The MDC supports legislation that—with respect to all actions—(a) places sensible restraints on damages awards to ensure that they are based in fact and (b) forecloses attenuated avenues of liability. We are very interested in watching and listening to the position of the physicians and hospitals to see whether the proposed legislation meets those objectives. MDC will likely support a bill that we believe offers the benefits of reasonable boundaries on damages, fair application of the laws, and rationally based liability to the whole of civil defendants in Maryland.

Revised Uniform Arbitration Act Brings Changes

BY ALEXANDER WRIGHT, JR.

The Revised Uniform Arbitration Act (the "Revised UAA"), Senate Bill 243, which failed to pass the General Assembly but will be back next year, expands upon the basic and often bare arbitration principles set forth in Maryland's Uniform Arbitration Act (the "Maryland UAA"). Md. Cts. & Jud. Proc. Code Ann. §§ 3-201-3-234. Specifically, the Revised UAA consolidates many sections of the Maryland UAA and sets forth specific arbitration guidelines, expands statutory definitions, allows an arbitrator to order discovery, and creates more leniency towards an effective resolution by expanding time periods. Perhaps the most significant change, however, is the increase in the power and authority afforded to arbitrators during arbitration proceedings while at the same time adding more specific requirements of an arbitrator through detailed determinations and disclosure of an arbitrator's impartiality. Below are outlined the major changes and additions found in the Revised UAA, followed by some less significant changes.

I. Major Changes/Additions found in the Revised UAA

A. Effect of Agreement to Arbitrate; Nonwaivable Provisions—Section 3-2D-04

Section 3-2D-04 provides an overview of which provisions of the Revised UAA may be waived. This section provides for easy statutory interpretation because the Maryland UAA had no comparable section but instead required the reader to determine from the specific statutory provision whether it could be waived.

B. Provisional Remedies—Section 3-2D-08

Under § 3-2D-08, the court, before an arbitrator is appointed, or the arbitrator, may enter an order for provisional remedies to the same extent and under the same conditions as if the controversy were the subject of a civil action. Provisional remedies are allowed by the arbitrator to protect the effectiveness of the arbitration proceeding.

A party, however, may move the court for such a remedy only if the matter is urgent and the arbitrator is not able to act timely or cannot provide an adequate remedy.

C. Consolidation of Separate Arbitration Proceedings—Section 3-2D-10

Under Section 3-2D-10 of the Revised UAA, the court may order the consolidation of separate arbitration proceedings as to all or some of the claims. Section 3-2D-10 provides detailed guidelines for this action. The Maryland UAA contains no comparable provision.

D. Disclosure by Arbitrator—Section 3-2D-12

A major change from §§ 3-201 through 3-234 of the Maryland UAA is the requirement of disclosure by the arbitrator. These sections require the arbitrator to disclose to all parties any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the proceeding. For example, the arbitrator must disclose any financial or personal interest, or an existing or past relationship with any of the parties. Failure to do so may be grounds for vacating an award.

E. Immunity of Arbitrator; Competency to Testify; Attorneys Fees—Section 3-2D-14

Section 3-2D-14 of the Revised UAA expands the power of an arbitrator by conferring upon the arbitrator immunity from civil liability to the same extent as a judge. In addition, in a judicial or administrative proceeding, unlike Maryland's UAA, § 3-2D-14 specifically states that an arbitrator is not competent to testify and may not be required to produce records as to statements, conduct, decisions, or rulings during the arbitration proceeding. Some exceptions, however, do apply. See §§ 3-2D-14(D)(1) and (2).

F. Witnesses; Subpoenas; Depositions; Discovery—Section 3-2D-17

Perhaps the most significant addition to the Revised UAA is that an arbitrator may order discovery, as the arbitrator deems appropriate, in addition to issuing discovery related orders. Further, arbitrators now have the power to issue protective orders to prevent the disclosure of privileged information, confidential information, or trade secrets. This section also expands the power of the arbitrator with respect to issuing subpoenas for production of records or other evidence at discovery proceedings and to take action against non-compliance. A court may enforce a subpoena or a discovery related order issued by an arbitrator in connection with an arbitration proceeding in another state, upon conditions determined by the court.

G. Judicial Enforcement of Pre-Award Ruling by Arbitrator—Section 3-2D-18

Section 3-2D-18 of the Revised UAA sets forth specific guidelines in the event that an arbitrator makes a pre- award ruling. The Maryland UAA contains no similar provision.

H. Remedies; Fees and Expenses or Arbitration Proceeding—Section 3-2D-21

New to the Revised UAA is the ability of an arbitrator to award punitive damages, reasonable attorneys fees, and such remedies as the "arbitrator considers just and appropriate under the circumstances." § 3-2D-21(C); see also, § 3-2D-21(B). If the arbitrator awards punitive damages, however, the arbitrator must specify the basis in fact justifying the award and in law authorizing the award.

Continued on page 6

(REVISED UNIFORM ARBITRATION) *Continued from page 5*

Under the old language of § 3-288 of the Maryland UAA, the court was only permitted to "award cost of the petition, the subsequent proceedings, and disbursements."

I. Appeals—Section 3-2D-28

Section 3-2D-28 of the Revised UAA specifies the circumstances under which a party may appeal an arbitrator's decision. This requirement appears to be useful, as §§ 3-201 – 3-234 of the Maryland UAA provided no such guidance.

J. Relationship to Electronic Signatures in Global and National Commerce Act—Section 3-2D-30

Section 3-2D-28 of the Revised UAA requires that all electronic records or signatures etc., conform to the requirements of § 102 of the Electronic Signatures in Global and National Commerce Act.

II. Minor Changes/ Additions Found in the Revised UAA

A. General Arbitration Provisions

1. The Revised UAA begins by expanding the definitions section at § 3-2D-01. For example, the definition of "court" no longer means a court in equity, but rather a circuit court in Maryland. In addition, the section defines new terms, including: arbitration organization, arbitrator, knowledge, person, and record, whereas section 3-201 only defined court, guardian, and personal representative.

2. Under the Revised UAA, motions are made to the court, not petitions, as seen in § 3-203(a) of the Maryland UAA.

3. The Revised UAA expands the notice requirements, which are contained in a separate section, § 3-2D-02. The Maryland UAA provides vague language concerning service ("notice of the initial petition for an order shall be served in the manner provided by law or rule of court for the service of summons in an action"). § 3-205(b). Section 3-2D-02 of the Revised UAA, entitled, "Notice," however, provides specific instructions regarding when to give notice, how to give notice, and what constitutes receipt of notice, ultimately avoiding any of the confusion that may have plagued § 3-205 of the Maryland UAA.

4. The Revised UAA has eliminated § 3-229, Death or incompetence of party; § 3-230 Proceedings upon death of a party; and § 3-220, Witness fees; transcript proceedings.

"Perhaps the most significant change, however, is the increase in the power and authority afforded to arbitrators during arbitration proceedings while at the same time adding more specific requirements of an arbitrator through detailed determinations and disclosure of an arbitrator's impartiality."

B. The Arbitration Process

1. Under § 3-206 of the Maryland UAA, "Validity of Arbitration agreements; agreements between employers and employees," a written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy arising in the future, did not apply to an arbitration agreement between employers and employees. The Revised UAA, however, eliminates any reference to this provision. See, § 3-2D-06.

2. Under § 3-207 of the Maryland UAA, if the opposing party denies the existence of an arbitration agreement, the court shall proceed "expeditiously to determine if the agreement exists." Under the new language of § 3-2D-06, however, the "arbitration proceeding may continue pending final resolution of the issue by the court…"

3. § 3-2D-07 of the Revised UAA, Motion to Compel or Stay Arbitration, consolidates §§ 3-208, 3-209, and 3-210, of the Maryland UAA for easier reference. The Revised UAA provides clarity to otherwise confusing provisions and leaves little to be interpreted.

4. Revised UAA, § 3-2D-15, Arbitration Process, consolidates, §§ 3-213 and 3-214 of the Maryland UAA with a few minor changes. Specifically, it appears to expand the arbitrator's power through additional language. First, "[a]n arbitrator may conduct an arbitration in such a manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding." Second, an arbitrator has the authority to decide a request for summary disposition of a claim or issue, something that appears to be lacking in the Maryland UAA. Third, an arbitrator is required to set the time and place of a hearing not less than five days before the hearing begins, where the Maryland UAA has no time requirement. Lastly, a replacement arbitrator must be appointed to continue the proceeding if an arbitrator ceases or is unable to act during the proceeding, unlike Maryland UAA § 3-215 which provides that the remaining arbitrators may continue with a hearing to determine the controversy.

C. Changing/Modification/ Vacating Award

1. When a party seeks to change an award, § 3-222 of the Revised UAA provides that a party now must object to a motion to modify or correct within 10 days of receipt of notice.

2. The Revised UAA provides new grounds for vacating an award including: improper notice of the initiation of an arbitration which substantially prejudices the rights of a party. In addition, the Revised UAA extends the time from 30 days to 90 days for filing a motion to vacate an award. Whereas § 3-224 of the Maryland UAA provides that a party has 30 days after delivery of a copy of the award or the grounds for corruption, fraud or other undue means became known or should have become known to file a petition to vacate, the Revised UAA proposes 90 days pursuant to § 3-2D-23.

Alexander Wright, Jr. formerly of the Circuit Court of Baltimore County is now a partner at Miles & Stockbridge P.C. He focuses his practice in the area of Alternative Dispute Resolution.

New Members

Harold L Burgin
Jennifer E. Cameron
Christopher S Gunderson
J. Michael Harrison
Rebecca E. Hassinger
Edwin L. Keating III
Kathleen M Maynard
Amy C. Rigney
Brooke J. Sigmon
Kristen H. Strain
Cindy D. Waeger

(BOZMAN) *Continued from page 1*

might be marital property. This issue can be divided into two questions: (1) What portion of a pre-divorce tort award might be marital property, and (2) How should a court consider a tort award as a factor in determining alimony and a marital property award. These issues are for later consideration.

Intentional Torts Now Allowed by Bozman's Abrogation of the Doctrine of Interspousal Immunity

It is the interrelationship between domestic relations law and the above-referenced torts that is of interest in the context of *Bozman*. As a result of *Bozman's* abrogation of interspousal immunity, the following causes of action may now be brought by a wife against her husband:

1. Assault;
2. Battery;
3. False Arrest;
4. False Imprisonment;
5. Trespass to Land or Chattels, Trover, Conversion, Replevin or Detinue;
6. Fraud;
7. Malicious Prosecution or Use of Process and Abuse of Process;
8. Tortious Interference with Contractual Relations or Prospective Advantage;
9. Defamation (Slander and Libel); &
10. Invasion of Privacy

Little discussion about each of the torts is needed individually. Excellent treatises exist on the elements and case law applicable to these causes of action, most particularly Sandler & Archibald, *Pleading Causes of Action in Maryland* (2d ed. 1998).

General Consideration: Where to File

When a divorce is contemplated, there are filing considerations pertaining to whether to file the tort cause of action before, concurrently with, or after filing for divorce. Additionally, as with any tort, the attorney must also determine the proper court of original jurisdiction. The District Court of Maryland has exclusive jurisdiction over any civil action where the amount in controversy is $5,000 or less and concurrent jurisdiction with the Circuit Courts where the amount in controversy is between $5,001 and $25,000. See Md. Cts. & Jud. Proc. Code Ann. §§ 4-401(1) and 4-402(d)(1)(i). The Circuit Courts have exclusive jurisdiction where a party requests a jury and more than $10,000 is at issue. See Article 23, Maryland Declaration of Rights, and Md. Cts. & Jud. Proc. Code Ann. § 4-402(e).

The ease of litigating in district court can be a significant factor in deciding where to file these torts. Records of medical bills or other specific money damages are fully admissible in district court without the need to provide an expert witness. See Md. Cts. & Jud. Proc. Code Ann. §§ 10-104 and 10-105. Furthermore, oftentimes, the speed with which you can reach trial is much greater in District Court.

If the Defendant in a District Court tort action files for divorce in Circuit Court, the District Court Plaintiff has the exclusive option whether to seek transfer of the original District Court tort action. See Md. Cts. & Jud. Proc. Code Ann. § 6-104(b). The District Court Defendant may oppose such a motion.

When to File: Thinking Through *Res Judicata*, Issue Preclusion and Claim Preclusion

Without a doubt, a party may bring an action for divorce together with a tort action or separately; and when brought separately, a party may bring one action before or after the first-filed action is completed. Simply stated, a tort may be filed before, simultaneously with, or after a divorce action. The fact that divorce and tort actions may be brought together in one complaint is clear under Maryland Rule 2-301, "There shall be one form of action known as a 'civil action.'" The Committee Note states that the direct purpose of this rule is to merge the litigation of law and equity matters.

Already, one judge has instructed a Circuit Court Clerk, administratively, not to accept Complaints that contain both a divorce action and a tort matter. This administrative reaction to *Bozman*, although erroneous, is understandable given the development of differentiated case management (DCM) now governed by Maryland Rule 16-202(b) and incorporated into scheduling orders by Maryland Rule 2-504(b)(1)(A). However, as will become more clear, this administrative practice could have unacceptable consequences to a party barred from bringing a divorce and tort action in the same Complaint.

Res Judicata, Issue Preclusion and Claim Preclusion: A Primer

Filing the Tort Action Before or After the Divorce Action

> *The preclusive effects of former adjudication are discussed in varying and, at times, seemingly conflicting terminology, attributable to the evolution of preclusion concepts over the years. These effects are referred to collectively by most commentators as the doctrine of "res judicata." See Restatement (Second) of Judgments, Introductory Note before ch. 3 (1982); 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4402 (1981). Res judicata is often analyzed further to consist of two preclusion concepts: "issue preclusion" and "claim preclusion." Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided. See Restatement, supra, § 27. This effect also is referred to as direct or collateral estoppel. Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit. Claim preclusion therefore encompasses the law of merger and bar. See id., Introductory Note before § 24.*

Kent County Bd. of Educ. v. Bilbrough, 309 Md. 487, 489–490, 525 A.2d 232, 233 (1987).

The importance of the *res judicata* effect of prior litigation in the context of family law arises from the fact that the court may consider tortious conduct by a spouse as a factor in awarding alimony, marital property and custody. In considering alimony and marital property awards, the courts are directed to consider "the circumstances that contributed to the estrangement of the parties." Md. Family Law Code Ann. §§ 11-106(b)(6) (alimony) and 8-205(b)(4) (marital property). With respect to custody, at least three of the factors set forth in *Montgomery Co. Dept. of Soc. Serv. v. Sanders*, 38 Md. App. 406, 420, 381 A.2d 1154, 1163 (1978) and *Taylor v. Taylor*, 306 Md. 290, 307-312, 508 A.2d 964, 972-975 (1986) are implicated by tortious conduct: fitness of the par-

Continued on page 8

(BOZMAN) *Continued from page 7*

ents, character and reputation of the parties, and potentiality of maintaining natural family relations.

Issue preclusion or "collateral estoppel can be invoked if the following requirements are met: '1) the identity of parties, 2) the actual litigation of an issue of fact or law, 3) the essentialness of the determination to the judgment and 4) the appealability of that determination by the party against whom issue preclusion is being asserted.'" *Esslinger v. Baltimore City*, 95 Md. App. 607, 627, 622 A.2d 774, 784 (1993) (quoting *Cassidy v. Bd. Of Educ.*, 316 Md. 50, 62, 557 A.2d 227 (1989).

An analysis of the factors cited above for alimony, marital property and custody awards can be weighed against the tort of battery. A battery is "a harmful or offensive contact with a person resulting from an act intended to cause the person such contact. See Restatement (Second) of Torts, § 13. The act in question must be some positive or affirmative action on the part of the defendant. Prosser & Keeton, *The Law of Torts*, §§ 9 (5th ed.1984)." *Saba v. Darling*, 320 Md. 45, 49, 575 A.2d 1240, 1242 (1990).

Consider, for example, if Ms. Able brings a battery claim against Mr. Able prior to the initiation of a divorce proceeding. What is the impact of a verdict for or against Ms. Able? The first and fourth *Esslinger* factors are not subject to complex analysis. In the hypothetical given here, the parties will always be the same, satisfying the first factor. The fourth factor simply requires that the matter have been subject to appeal and not be subject to further appeal. If Ms. Able obtains a verdict in her favor on the tort claim, the court could bar the parties from relitigating the battery in a later divorce action. Even if that is the case, the court hearing the divorce case could consider other incidents of battery as a factor in awarding alimony, monetary awards, or custody.

"The abrogation of interspousal immunity carries with it, for family law practitioners, issues concerning case strategy, procedure, issue preclusion and a new realm of advice owed to clients."

Reversing the hypothetical, however, complicates the analysis. Physical violence by one spouse towards another is not an express issue in a divorce proceeding, except perhaps regarding the grounds for divorce. Instead, a court considers the factors as specified by the statutes or as outlined in the cases on determining the best interests of minor children and the respective financial needs of the parties. Accordingly, it is arguable that a single incident of battery is not an "issue" in a divorce. Instead, it is one of many facts that may go into the court's analysis of the conduct of the parties during the marriage leading to the estrangement, and evidencing the fitness of the parents, etc.

Finally, even as to grounds for divorce, a single act of violence does not appear to constitute grounds for divorce based on cruelty of treatment. In 1998, in response to the common sense demands of many women's organization, cruelty of treatment and excessively vicious conduct (referring to vice, not violence–see *Shutt v. Shutt*, 71 Md. 193, 17 A. 1024 (1889)) were added as grounds for absolute divorce set forth in Family Law Article, § 7-103. The Legislature transferred the language for these two new grounds for absolute divorce from the statute concerning limited divorce, Family Law Article § 7-102. Absent future appellate decisions expanding the definitions of these two grounds for divorce, they generally require more than a single incident of tortious conduct and more than simple conduct evidencing vice.

In *Neff v. Neff*, 13 Md. App. 128, 130, 281 A.2d 556, 558, (1971), the following was determined not to constitute cruelty of treatment:

> *[Mrs. Neff] told the court that on December 17, 1969 appellee struck her in the face with his fist, knocking her to the floor, and that he then kicked her. She further stated that he was intoxicated, used vile language, and told her that she was to leave. This incident was not denied by appellee and was corroborated by appellee's eighteen year old daughter who generally supported appellant's testimony. Mrs. Neff testified that after the physical assault, her husband got an ice pack for her face and apologized for his behavior. Appellant described her injuries as a slight bruise on one eye, a slight cut on the other eye, sore jaw, a swollen, bruised and cut inner lip, and bruises on her arms, back and side.*

By today's standards, *Neff* might very well be decided differently. See *Das v. Das*, 133 Md. App. 1, 754 A.2d 441 (2000). Other cases, however, clearly state that a single incident of physical violence constitutes grounds for divorce based on cruelty only where the violence is life threatening. A course of conduct of lesser violence will serve as cruelty grounds only if it threatens the life, person or health of the person who is cruelly treated. As to excessively vicious conduct, little appellate guidance exists. Some examples of what may constitute such conduct include certain forms of sexual misconduct, e.g., a sexual relationship with an adult step-child, sexual child abuse, secret videotaping of family members in the nude. The example of videotaping, which certainty constitutes the tort of invasion of privacy, may not constitute excessively vicious conduct. For example (and speculating), secret videotaping of a spouse, never published and kept secret, may not constitute evidence of this grounds of divorce if later discovered by the offended spouse during a search. Videotaping of multiple family members probably would constitute such misconduct.

In either event, it seems clear that merely prevailing in a tort proceeding involving personal injury, whether for battery, assault or invasion of privacy, in and of itself would be insufficient to preclude a claim for divorce on grounds of cruelty or vicious conduct.

The conclusion is also supported by the

Continued on page 9

Get Involved With MDC Committees

Appellate Practice
Defense Line
Judicial Selections
Legislative
Program
Employment & Labor Law
Negligence & Insurance
Products Liability
Professional Malpractice
Workers' Compensation

To volunteer, contact the chairs at **www.mddefensecounsel.org/exec.html**.

(BOZMAN) *Continued from page 8*

decision of the Court of Appeals in *Brown & Sturm v. Frederick Rd. Ltd. Partn.*, 137 Md. App. 150, 193, 768 A.2d 62, 85-86 (2001):

> *Appellees miss, however, the element of essentiality or necessity, which must be present for collateral estoppel to apply. Indeed, the factual determination of the issue upon which collateral estoppel is sought must have been "essential to the judgment" in the prior action. Deitz, 120 Md. App. at 396-97. If such factual determination was not essential to the prior decision—that is, if the trial court could have reached the same disposition by resting its judgment on grounds for which that finding of fact was not required—then collateral estoppel does not apply, even if the court in the later case had before it facts shared with the transaction or occurrence under litigation in the prior proceeding. [Citations omitted.]*

Practitioners are forewarned, however, that the trial court determines issue preclusion on a case by case basis using the factors from *Esslinger* enumerated above. In the hypothetical above and generally, the court's decision will be based on the second factor, whether the issue of law or fact is the same in both cases, and the third factor, whether the issue litigated in the first case was "essential" to the court's determination.

Filing the tort action concurrent with the divorce action

The law is clear that no issue preclusion effect occurs when tort and divorce actions are filed in the same suit but later bifurcated for determination. In a very short opinion, the Court of Appeals stated in *Blades v. Woods*, 338 Md. 475, 479, 659 A.2d 872, 874 (1995):

> *Nor did the circuit court's severance order, although directing that the claims proceed as "separate actions," have the effect of converting the single action filed by Blades into two separate actions for purposes of res judicata or issue preclusion so that a ruling in the phase firstly to be decided could be conclusive in the phase secondly to be decided. In entering its severance order the circuit court was acting pursuant to Rule 2-503(b) which provides as follows:*
>
> *"In furtherance of convenience or to avoid prejudice, the court, on motion or on its own initiative, may order a separate trial of any claim, counterclaim, cross-claim, or third-party claim, or of any separate issue, or of any number of claims, counterclaims, cross-claims, third-party claims, or issues."*

The Court of Appeals in *Blades* rejected the issue preclusion argument on grounds that the fourth *Esslinger* factor, appealability, was not satisfied. This was because the first decision at issue was still interlocutory. The fourth *Esslinger* factor, therefore, requires that the previously decided case must not only have been subject to an appeal but that the appeal must not be pending or still available.

A safe middle ground appears to be filing any tort actions concurrent with a divorce action. As noted above, this has apparently been frowned upon by one administrative judge, but the right to do so appears clear, as many combined actions in equity and law are filing in property and contract cases.

An action containing counts in tort and for divorce with a jury prayer screams to be bifurcated under Maryland Rule 2-503. Trying the divorce and tort action with a jury would require the court frequently to excuse the jury to prevent it from hearing testimony relevant to the divorce and irrelevant and prejudicial with respect to the tort claim. In so doing, a court would be wise to try the tort action first so as to be guided by the jury's decision on the tort matter.

Claim Preclusion

While it seems likely that issue preclusion will arise in situations where tort and divorce cases are litigated by married parties, the same cannot be said of claim preclusion. The rationale underlying claim preclusion and issue preclusion is the desire to avoid endless litigation between parties. The policy avoids "the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibilities of inconsistent decisions." *Murray Int'l. Freight Corp. v. Graham*, 315 Md. 543, 547, 555 A.2d 502, 503-504 (1989) (citations omitted).

It would be illogical for the courts to say that the failure to bring a divorce action concurrently with a tort action subjects to divorce action to claim preclusion. The question is whether this axiomatic conclusion will apply when a party brings a divorce and could have but does not bring a tort action that was ripe. A close reading of *Kent County*, however, appears strongly to oppose the idea that a court could require such diverse claims as tort and divorce actions to be brought together. The case discussion is lengthy, but the portion of the case which discusses the Restatement (Second) of Judgments is worth quoting:

> *Consequently, the American Law Institute in § 24 of Restatement (Second) of Judgments has adopted the following standards for determining the "Dimensions of 'Claim' for Purposes of Merger or Bar—General Rule Concerning 'Splitting'":*
>
> *(1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar (see §§ 18, 19), the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.*
>
> *(2) What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage. [Footnote omitted.]*

Kent County Bd. of Educ., 309 Md. at 498, 525 A.2d at 237-238. The court later adopts this Restatement. Kent County Bd. of Educ. v. Bilbrough., 309 Md. at 499, 525 A.2d at 238.

Negotiating the Minefield

This article is restricted to an evaluation of these filing issues vis-a-vis Maryland law.

Continued on page 10

(BOZMAN) *Continued from page 9*

Thirty-seven states before Maryland may have had the opportunity to address these issues as well as the relationship between tort judgment, alimony and marital property. Evaluating these issues for appellate purposes requires, after examining Maryland law, an examination of how other states have dealt with these issues.

In interviewing a new domestic relations client, a practitioner must now consider the following:

A. Include in your interview any pertinent inquiry into tort claims your client may have;

B. If you decide not to pursue tort claims on behalf of your client, it is essential you notify your client, in writing, of the pertinent statutes of limitations; and

C. If you decide to pursue any tort claims, evaluate strategically where and when to file.

Jack Condliffe practices law with his wife Judith Shub-Condliffe. He has a general practice with a focus in family law, torts and appellate practice. He is the chairperson of the Baltimore County Bar Association Pro Bono Committee and vice-chairperson of the Maryland Trial Lawyers Association Trial Reporter Committee. In 2004, he and Judy were named the Baltimore County Pro Bono Attorneys of the Year in recognition of their years of work volunteering as mediators and in accepting pro bono cases from the courts and pro bono agencies.

All-Day Symposium
MDC/ATLA (Maryland chapter)

October 26, 2004
Location TBD

To examine the civil jury system in Maryland.

The program will feature panels of prominent jurists, plaintiffs' and defense trial attorneys and jury commissioners to address the nuts and bolts of jury selection for newer practitioners, plans to improve the experience for citizens called for jury duty, as well as esoteric topics on the future of the jury system for the more experienced lawyers.

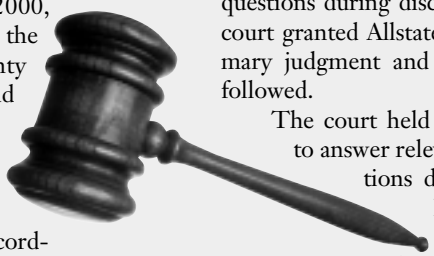
For more information visit www.mddefensecounsel.org.

Recent Decisions

William H. Phillips v. Allstate Indemnity Company, 156 Md.729 (2004).

Opinion by Judge J. Kenney

William H. Phillips appeals from an order of the Circuit Court for Prince George's County granting summary judgment in favor of Allstate Indemnity Company (Allstate). On October 30, 2000 Phillips purchased a 2001 Yamaha motorcycle for $12,054.66. Phillips obtained an insurance policy from Allstate that included protection against loss of the motorcycle. Sometime between the evening hours of November 8 and the morning hours of November 9, 2000, the motorcycle allegedly was stolen from a parking space in front of Phillips' apartment. On November 9, 2000, Phillips notified both the Montgomery County Police Department and Allstate of the theft.



On November 19, 2000 Phillips provided an employee of Allstate with a recorded statement, in which he stated that he worked at a car dealership trading as Royal Auto under the supervision of Mr. Poe and earned approximately $3,000 per month. He claimed to have earned additional money by gambling in Atlantic City and "detailing" automobiles. He further claimed that his friend, Mike Stevens, had loaned him some of the money to purchase the motorcycle. When Allstate contacted Royal Auto to verify the information, it learned that Phillips was neither a current nor a past employee and there was no supervisor by the name of Mr. Poe.

Because of the inconsistencies in his statement, Allstate required Mr. Phillips to submit to an examination under oath (EUO). During the EUO, Mr. Phillips refused to answer any questions relating to his financial affairs claiming that they were not relevant to the situation because Mr. Phillips paid for the motorcycle in cash and this is not a situation where there had been an arrearage in payments that Mr. Phillips was looking to avoid. Allstate's attorney disagreed and by letter dated January 11, 2001, Allstate denied Phillips' claim based on lack of cooperation.

On July 20, 2001, Phillips filed a complaint for breach of contract, which was amended in March 2003 adding an additional count for declaratory judgment. After discovery began, Allstate filed a motion for summary judgment, arguing that Phillips could not pursue a claim "after making material misrepresentations, failing to cooperate…during an EUO, and refusing to answer relevant questions during discovery." The circuit court granted Allstate's motion for summary judgment and this timely appeal followed.

The court held "appellant's refusal to answer relevant, material questions during the required EUO was a breach of the insurance contract and, in effect, a failure to cooperate." Judge Kenney explained, "[g]enerally, during an EUO, an insurer is 'entitled to conduct a searching examination, though all questions should be confined to matters relevant and material to the loss…An insured is not required to answer immaterial questions, and the materiality of a question 'is determined in the context of the insured's claim and the insurer's investigation'…In a theft case, the insurer may ask questions 'relating to possible motives for fraud, such as prior loss or claim history, and financial circumstances of the insureds." Judge Kenney also explained that the insurer in this case does not have to show actual prejudice because the Maryland rule on prejudice codified at Md. Code (1995, 2002 Repl. Vol.), §19-110 of the Insurance Article applies to liability insurance while the case sub judice does not involve a third party claim.

SPOTLIGHTS

On Tuesday, February 3, 2004, after a trial lasting six days, Doug Murray and Amy Askew of WHITEFORD, TAYLOR & PRESTON, LLP obtained a defense verdict in favor of CSX Transportation, Inc. in the case of Carl W. Jones v. CSXT in the Circuit Court for Washington County. The Plaintiff alleged that he was permanently and totally disabled as a result of walking on ballast which the Plaintiff maintained was excessively large and uneven and failed to comply with CSX's own specifications for yard ballast. The Plaintiff worked in the railroad's Brunswick, Hancock and Martinsburg yards. This is a very significant victory as plaintiffs' firms handling claims for railroad workers have felt ballast claims could be the "next wave" in cumulative trauma litigation.

In the case of *Rice v. Wise*, Craig Merkle and Shannon Madden Marshall received a defense verdict in the Circuit Court of Charles County. This was a medical malpractice case in which the plaintiffs alleged that Dr. Wise, an orthopedic surgeon, failed to diagnose a complete rupture of the quadriceps tendon, which allegedly resulted in permanent disability. The plaintiffs asserted negligence and informed consent theories of liability. The jury returned a defense verdict on all theories.

In the case of *Lemaster v. Yousefi*, Craig Merkle received a defense verdict in the Circuit Court of Montgomery County. This was a medical malpractice case in which the plaintiff alleged that Dr. Yousefi, a plastic surgeon, negligently caused a pneumothorax during breast augmentation surgery. The jury returned a defense verdict.

Scott M. Trager of SEMMES, BOWEN & SEMMES, P.C. in Baltimore obtained a defense verdict in favor of Selective Insurance Company of America in the Circuit Court for Baltimore County. Plaintiff Judith Schussler brought suit against Defendants Ray R. Potter, Sr. and Selective Insurance Company of America, Ms. Schussler's uninsured/underinsured insurance carrier, for personal injuries arising from a November 29, 2001 motor vehicle accident in Towson, Maryland. Since Defendant Potter had in effect a valid insurance policy, the parties, pursuant to *Fireman's Fund Ins. Co. v. Bragg*, 76 Md. App. 709 (1988), had stipulated prior to trial that if Defendant Potter was, in any way, found negligent, he would be solely responsible for the entire judgment (up to policy limits) even if the "phantom vehicle" was also found negligent. Although the jury found in favor of Plaintiff Schussler, it also found that Defendant Potter was negligent; therefore, Defendant Selective Insurance Company of America had no liability.

In the case of *Sweeney v. Recreational Industries*, Judge William M. Nickerson, United States District Judge, granted Defendant's Motion for Summary Judgment, ruling that Plaintiff both impliedly and expressly assumed the risk of personal injury by engaging in the sport of skiing. Implied assumption of risk can be decided as a matter of law "if a person of normal intelligence in the same position as the Plaintiff, would have clearly comprehended the danger…" The danger, in the context of recreational activities, is "those risks 'incidental' to the sport which are 'obvious and foreseeable.'"

Express assumption of risk involves interpretation of exculpatory clauses that release a defendant/premises owner from its duty to plaintiff. Maryland recognizes the validity of such exculpatory clauses unless there is a public policy basis for an exception. A public policy exception can be based on one of three things: (1) wanton, gross or reckless negligence on the part of the defendant; (2) unequal bargaining power between the parties; or (3) a patently offensive transaction affecting the public interest. Relying primarily on *Seigneur v. National Fitness Institute*, 132 Md. App. 271 (2000), Judge Nickerson ruled that plaintiff faced a "substantial obstacle" in "attempting to obtain a public policy exception to a valid exculpatory clause in a recreational context."

Jefferson V. Wright, E. Hutchinson Robbins, Jr. and Todd M. Reinecker from MILES & STOCKBRIDGE P.C. recently won summary judgment for the Board of Commissioners of Calvert County (the "County") with respect to a claim brought by Chesapeake Ranch Water Company ("Chesapeake") relating to Chesapeake's alleged right, under 7 U.S.C. §1926(b), to provide water service to two new areas of commercial development in Calvert County, known as Lusby Town Center and Patuxent Business Park. See *Chesapeake Ranch Water Company v. The Board of Commissioners of Calvert County*, Case No. 8:03-CV-02527-AW. Chesapeake's claimed right to provide service to these new areas of development, and its attempt to use the statute "offensively" to require the County to grant a franchise extension into those areas, were issues of first impression in the Fourth Circuit. Following extensive briefing by the parties and oral argument, the district court found that Lusby Town Center and Patuxent Business Park did not fall within Chesapeake's franchised service area and that Chesapeake could not properly invoke §1926(b) to annex (and thereby effectively become a "roving monopoly" in) these areas. Chesapeake has filed an appeal with the Fourth Circuit and oral argument is expected for the fall term.

Save the Dates

DRI's 2004 Annual Meeting

October 6–10, 2004
New Orleans Marriott

Special Guest Speakers

Ben Stein

Howard Fineman

Robert J. Grey, Jr.
2004–2005 ABA President

James McElhaney

In addition, join us for DRI's very own Jazz Fest and Riverboat Casino!

For more information, visit www.dri.org.

Courthouse Copy Service
Scanning, Imaging, Graphics and Design

Services For Today's Legal Needs

- Imaging
- Laminating
- OCR Scanning
- CD Duplication
- Color Laser Copying
- Computer Generated Graphics
- Electronic Database Management
- Exhibit Preparation and Digital Color Output
- Litigation & High Speed Document Copying
- On - Site Discovery Copying
- X-Ray Duplicating Services
- Large Document Copying
- VHS & Cassette Copying
- Document Numbering
- Drymounting
- Bindery

Courthouse Digital
A Division of Courthouse Copy Service

Baltimore

38 South Street
Baltimore, Maryland 21202
410-685-1100
dhudghton@courthousecopy.com

Washington

2029 K Street NW, Lower Level,
Washington, D.C. 20006
202-872-1100
rtabler@courthousecopy.com

THE DEFENSE LINE

A Publication from The Maryland Defense Counsel
P.O. Box 5371
Lutherville, MD 21094

www.mddefensecounsel.org