



THE



# DEFENSE LINE



A Publication From The Maryland Defense Counsel, Inc.

Fall 2011

## "Establishing 'Friends' Under the Rules of Evidence"

Christopher R. Daily



### Also Featured

"Leveraging Communication Technology to Reduce Litigation Costs"

"*Expressio Unius* is Moot: Commission Jurisdiction on Appeal Expanded by the Courts"

"Court of Appeals Restricts Workers' Compensation Act Preemption and Limits the 'Prior Bad Acts' Rule to Criminal Cases"

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We will also no doubt face continuing efforts in Annapolis to erode our clients' ability to defend themselves, and MDC stands ready to make sure our voice is heard by providing timely and comprehensive information to the General Assembly. To the extent you become aware of important issues for

your clients or your practice, please let us know so that we can support you.

Similarly, to the extent those issues arise in the context of an appeal, MDC will continue its amicus support.

In addition to our usual array of events, a highlight of this year will be a repeat of last year's Trial Academy. We will no doubt be in touch with many of you for ideas and faculty support. If there are any other particular educational programs that you think would be of interest to the Defense Bar, please do not hesitate to let us know.

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# Leveraging Communication Technology to Reduce Litigation Costs

Joseph A. Grabowski and John T. Sly



attorneys and legal team members follow the text of the deposition on their computers as the stenographer writes the testimony. This “dirty” version of the transcript can permit various participants at multiple locations to follow the testimony as it occurs. Typically, realtime writers can produce text using

stenograph machines at the rate of at least 200 words per minute. Realtime reporting is already established in Communication-Access-Realtime-Translation (CART) which is used to assist the hearing impaired by translating spoken words into text. Also, realtime reporting technologies are used in

*Continued on page 7*

The negative economic downturn has impacted the return on investment seen by insurers and private companies while the amount of litigation and their associated costs continue to rise. According to a recent study by international law firm, Fulbright & Jaworski, more than one third of US companies say that the economic downturn has resulted in an increase in their litigation caseloads and no reduction in litigation costs. Edward M. Petrie, “Litigation Costs on the Rise”, Special Chem, September 22, 2010 (<http://www.specialchem4adhesives.com/home/editorial.aspx?id=4063>). This article will discuss some of the new communication technologies available that can safely realize cost reductions for clients while expanding the ability to involve them.

To keep costs manageable, depositions have long been conducted by telephone. The downside is one cannot observe demeanor and body language. Videoconference is another way to go, requiring lining up videoconferencing services in all locations. This is the most stable and reliable method to bring parties together in remote locations but cost can be a factor. Traveling to facilities might also be inconvenient for the participants if sites are not nearby. While multi-point videoconferencing is possible, it is not always feasible or cost-effective.

With the latest developments in technology, all interested parties can be present for the deposition without travel. Everyone, including the court reporter and videographer, can be connected through internet text and video streaming. Given advances in software and internet speed, every medium — text, audio, video — can be streamed, viewed, shared and captured in realtime.

Internet text and video streaming is a progression of realtime reporting, whereby

## Editor's Corner

The Editors are proud to publish this latest edition of *The Defense Line*, which features several interesting articles and case spotlights from our members. The lead article, submitted by Christopher Daily of Miles & Stockbridge P.C., provides insight into authentication issues and concerns associated with social networking evidence. Joseph A. Grabowski and John T. Sly discuss how litigation communication technology can both expand the ability of attorneys to effectively represent their clients while reducing the costs associated with litigation. An article by Wendy B. Karpel, who is the co-chair of The Maryland Defense Counsel's Programs and Membership Committee, discusses a recent Maryland court opinion in which the jurisdiction of the Maryland Workers' Compensation Commission was expanded. In addition to these articles, Gregory Garrett of Tydings & Rosenberg LLP discusses a recent case in which the Court of Appeals restricted the Workers' Compensation Act and limited the “prior bad acts” rule to criminal cases.

The Maryland Defense Counsel has had a number of successful events since the Winter 2010 edition of *The Defense Line*, including the always popular Past Presidents Reception. Mark your calendars now for Maryland Defense Counsel's Annual Meeting and Crab Feast, which will take place on June 7, 2012 at 5:30 p.m. at Bo Brooks in Canton! The Editors encourage our readers to visit the Maryland Defense Counsel website ([www.mddefensecounsel.org/events.html](http://www.mddefensecounsel.org/events.html)) for full information on the organization's upcoming events.

The Editors sincerely hope that the members of the Maryland Defense Counsel enjoy this issue of *The Defense Line*. In that regard, if you have any comments or suggestions or would like to submit an article or case spotlight for a future edition of *The Defense Line*, please feel free to contact the members of the Editorial Staff.

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(Leveraging Communication Technology) *Continued from page 5*

closed captioning in television broadcasts.

Because remote parties can attend online from multiple locations, it saves travel costs and reduces time away from the office. A revolutionary aspect of the new technology is that clients and experts can also follow the deposition in realtime — something that has traditionally been cost prohibitive. As with any realtime deposition, a rough transcript can also be made available for review until the final is produced and delivered.

Moreover, an internet video stream can be provided that can include the video with realtime synch text. This is often termed “captioning.” A video DVD with the synchronized text can also be later produced. When you play the video, each line of testimony scrolls as the witness speaks, capturing demeanor, body language and tone of voice. Furthermore, you can conduct text-based searches to zero in on crucial statements, and easily create video clips to import into trial presentation software. Presentation at trial or in other venues is made much easier and becomes more compelling in this format.

Maryland Rule 2-416 expressly permits “[a]ny deposition [to] be recorded by videotape or audiotape without a stenographic record, but a party may cause a stenographic record of the deposition to be made at the party’s own expense.” Md. R. 2-416(a). Therefore, there is no legal prohibition to moving forward with internet video and synched transcription. Be aware, however, that Maryland Rule 2-412(b) does require that the notice of deposition “shall specify the method of recording.” To be safe, express description of the use of digital video recording should be included in the notice. *See* Md. R. 2-412(b). Finally, where one intends to “videotape” the deposition for use at trial, the attorney should be aware of the notice requirements and that Maryland Rule 2-419(a)(4) provides that a videotaped deposition of a “treating or consulting physician or of any expert witness may be used for any purpose even though the witness is available.”

The application of this technology can take many forms. Take for instance a situation where you go to Los Angeles to take a deposition of an opponent’s expert. Your expert, a person who can provide critical insight in to the process of questioning, is in New York. To fly your expert to Los Angeles with you would include round-trip airfare plus hotel, transportation and meals. Clients rarely find this cost-effective. For the same reason, the associate who has been working on the case with you from the outset cannot participate in the deposition.

As an alternative, you, the expert and



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your associate — and your client — can participate in the deposition in realtime. Systems allow multiple persons to be able to see and listen to the witness and also view realtime testimony. The latter are often termed “observers” who can monitor testimony. However, depending on the technology used, the observers can still highlight statements, make notes and send private messages to you and/or your associate. For example “page 92, line 7 contradicts earlier testimony — bring this up.”

Commercial online services such as Skype and Google+ provide some of the connectivity mentioned and may be useful for less formal interactions. However, when conducting a discovery deposition or *de bene esse* trial testimony, it is critical that reliable and secure connections are used. Also, given that a court reporter is required for both anyway, it may be more cost effective and efficient to simply have the court reporting agency set up the connection and monitor the technology as the deposition is ongoing.

Unfortunately, serious issues regarding the security of commercially available internet connection programs like Skype and Google+ have been raised. In a PCWorld article dated October 10, 2011, it was reported that the German government had been using eavesdropping tools to intercept Skype calls. Jeremy Kirk, “German Government’s Skype Spying Tool has Holes, Hackers Say”, PCWorld ([http://www.pcworld.com/article/241571/german\\_governments\\_skype\\_spying\\_tool\\_has\\_holes\\_hackers\\_say.html](http://www.pcworld.com/article/241571/german_governments_skype_spying_tool_has_holes_hackers_say.html)). The tool called “Quellen-TKU” was developed “ostensibly for wiretapping internet phone calls” and is a “lighter version of a more encompassing surveillance tool conceptualized by the German government.” *Id.* The ease with which commercially available

products can be breached should give pause to attorneys who may be concerned with privileged and commercially sensitive information. One should inquire of any internet video provider as to what type and level of security is used to protect communications. Most court reporting programs use encryption and password protection systems to provide security.

The law rightfully demands that attorneys be careful with critical aspects of their cases. Therefore, attorneys are often slow to adopt new technology. However, technology that can both expand the ability of attorneys to effectively represent their clients while reducing the costs associated needs to be incorporated into practice.

*John T. Sly is a partner at Waranch & Brown, LLC.*

*Joseph A. Grabowski is CEO of Gore Brothers Reporting & Video, a silver sponsor of MDC. Joe began reporting in 1976, started working at Gore Brothers in 1978, and bought the company in 1996. He has covered reporting assignments throughout the Mid-Atlantic region and parts of Europe. In 1996 he went to Poland for the Department of Justice to report on statements from survivors of concentration camps. Joe is past president and currently on the board of the National Network of Reporting Companies, a member of The National Court Reporters Association, past president of the Maryland Court Reporters Association, Chairman of the State Association’s Education Advisory Committee, a member of the Society for The Technological Advancement of Reporting and appointed by Chief Judge Robert M. Bell to Maryland’s first State Committee on Court Reporting.*

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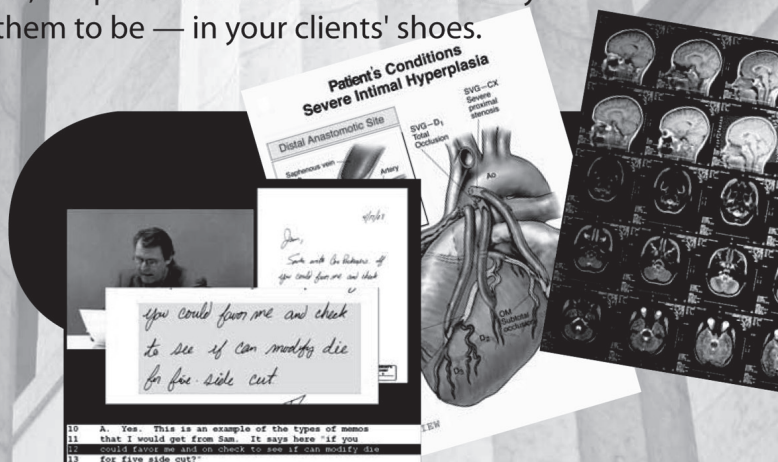


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# Establishing ‘Friends’ Under the Rules of Evidence

Christopher R. Daily

*ANTOINE LEVAR GRIFFIN V. STATE OF MARYLAND*, No. 74, SEPTEMBER TERM 2010



In an Opinion authored by Judge Battaglia, the Court of Appeals, in a 5–2 decision, recently reversed a murder conviction, finding that the State failed to properly authenticate information from a MySpace

profile, which was offered into evidence during trial. In doing so, the Court noted specific concern that a MySpace profile can easily be created under an alias and held that the State failed to establish the validity of the asserted creator of the profile, as well as its content, pursuant to Maryland Rule 5-901.

## Factual Background in Support of the Appeal

Antoine Levar Griffin was charged and convicted in connection with the shooting death of Darvell Guest. During the trial, the State sought to introduce into evidence the alleged MySpace profile of Mr. Griffin’s girlfriend, Jessica Barber. The evidence was intended to demonstrate that Ms. Barber threatened another witness called by the State. Specifically, the profile contained the following message:

“FREE BOOZY!!!! JUST REMEMBER SNITCHES GET STITCHES!! U KNOW WHO YOU ARE!!”

Importantly, the State did not question Ms. Barber regarding her alleged MySpace profile while she was on the stand. Rather, the State attempted to authenticate the profile through the lead investigator in the case, Sergeant John Cook. The profile was under the name “Sistasouljah,” but Sergeant Cook identified the profile as Ms. Barber’s, because it described a 23 year-old female from Ms. Barber’s town, listed Ms. Barber’s birthday, posted a photograph of her with Mr. Griffin, and contained a reference to Mr. Griffin as “Boozy”— a nickname used by Ms. Barber.

The trial court permitted the evidence to be introduced, and the Court of Special Appeals upheld the decision. The Court of Appeals reversed upon consideration of

whether the State: (1) properly authenticated the profile as being created by Ms. Barber; and (2) properly authenticated the profile’s specific content as being created by Ms. Barber, namely “FREE BOOZY!!!! JUST REMEMBER SNITCHES GET STITCHES!! U KNOW WHO YOU ARE!!”

## The Majority’s Rationale

The Court’s primary concern in reversing the decisions of the trial court and Court of Special Appeals, was that neither of those Courts gave appropriate consideration to “the possibility or likelihood that another user created [Ms. Barber’s] profile or authored the ‘snitches get stitches’ posting.” The Court noted that anyone can create a MySpace profile at no cost, provided the user has an email account and claims to be over the age of fourteen. Additionally, once a profile is created, that user can invite others as “friends,” thereby allowing other individuals unlimited access to the profile, including the ability to post information on the site.

The Court stated that an authenticity concern arises, because “anyone can create a fictitious account and masquerade under another person’s name or can gain access to another’s account by obtaining the user’s username and password.” As such, the State’s authentication method of identifying the profile through Ms. Barber’s date of birth and picture on the site was insufficient, pursuant to Maryland Rule 5-901, because anyone could have created the profile and populated it with the information. Furthermore, even assuming the profile was initially created by Ms. Barber, the State’s method of authentication also failed to establish that Ms. Barber authored the alleged threat posted on the profile, and relied upon at trial —“FREE BOOZY!!!! JUST REMEMBER SNITCHES GET STITCHES!! U KNOW WHO YOU ARE!!”

The Court noted that the concern was not academic, and cited several cases from other jurisdictions in support of its decision. *See, e.g., U.S. v. Drew*, 259 F.R.D. 449 (D.C.C. Cal. 2009) (mother prosecuted after creating a fictitious MySpace profile of

an adolescent boy to “flirt” and “break-up” with her daughter’s former friend, resulting in the former friend’s suicide); *see also U.S. v. Jackson*, 208 F.3d 633 (7th Cir. 2000) (finding that information from an organization’s website could not be authenticated because no evidence was presented to demonstrate that the information was actually posted by the organization); *Commonwealth v. Williams*, 926 N.E.2d 1162 (Mass. 2010) (holding that MySpace messages were not properly authenticated, because State failed to offer evidence regarding who had access to the page and whether the purported creator authored the relevant message); *People v. Lenihan*, 911 N.Y.S.2d 588 (N.Y. Sup. Ct. 2010) (precluding introduction of MySpace photographs stating the ability to “photo shop” images on a computer precluded the ability to authenticate the proffered pictures).

The Court reversed and remanded, finding that the State failed to properly authenticate the evidence as “what it purported to be:” a MySpace profile created by Ms. Barber, containing specific content created by Ms. Barber.

## The Dissent’s Rationale

The Dissenting Opinion was authored by Judge Harrell, with Judge Murphy joining in the Opinion. The Dissent’s position was that “the picture of Ms. Barber, coupled with her birth date and location,” were sufficient “distinctive characteristics” on the MySpace profile to authenticate the evidence pursuant to Maryland Rule 5-901(b)(4). The Dissent further stated that Maryland should adopt the “reasonable juror standard” regarding authenticity, as articulated by federal courts construing Federal Rule 901, from which Maryland Rule 5-901 is derived. The Dissent reasoned that the “‘reasonable juror’ standard is consistent with Maryland Rule 5-901 — requiring only ‘evidence sufficient to support a finding that the matter in question is what its proponent claims.’”

In applying this standard, the Dissent stated that a reasonable juror could conclude the profile and its contents were created by Ms. Barber based on the information offered by the State through Sergeant Cook. The Dissent noted the Majority’s

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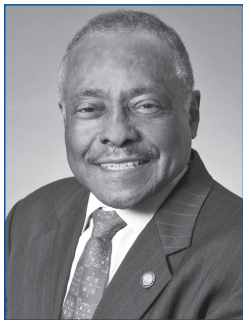
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concerns regarding the potential manipulation of a MySpace profile; however, the Dissent found no motive to do so, and stated that the Majority's apprehensions should be addressed in assessing the weight of the evidence, not its admissibility.

### Authentication of Social Networking Evidence Following the Decision

As an initial matter, the Majority expressly noted that information from social networking sites can be admitted into evidence, if properly authenticated — and the Court provided non-exhaustive examples. First, the proponent of the evidence can simply ask the purported creator at trial if he/she authored the profile and associated content. Second, the alleged creator's internet history and hard drive could be searched to determine whether the computer was used to originate the profile and posting. Finally, the Majority suggested contacting the social networking website directly to establish who initiated the profile and related content.

It should also be noted that the Majority did not completely discredit the Dissent's "reasonable juror" standard, and, instead,



stated that it was beyond the scope of issues before the Court. Specifically, the Majority discussed the "reasonable juror" standard in a series of footnotes and observed that some federal courts have resolved the uncertainty regarding social networking evidence authenticity by embracing the notion of "conditional relevancy," pursuant to Federal Rule 104(b). The Federal Rule provides "[w]hen the relevancy of evidence depends upon the fulfillment of a condition of fact,

the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." The Majority noted that federal courts have used Federal Rule 104(b) to weigh the reliability of social networking evidence against the possibility that "an imposter generated the material in question." The Majority recognized that Maryland Rule 104(b) is "nearly identical" to its federal equivalent, and, therefore, implied that the protocol utilized by the federal courts is potentially available in Maryland as well. The Majority, however, left the issue open, finding it beyond the scope of review.

*Christopher Daily is an associate in the Products Liability Group of Miles & Stockbridge P.C. He is located in the firm's Baltimore Office, and his primary practice areas include the defense of manufacturers in product liability claims, as well as the defense of healthcare providers and institutions against medical malpractice claims.*

*The opinions expressed and any legal positions asserted in this article are those of the author and do not necessarily reflect the opinions of Miles & Stockbridge or its other lawyers.*

## *Expressio Unius* is Moot: Commission Jurisdiction on Appeal Expanded by the Courts

Wendy B. Karpel

*SANCHEZ V. POTOMAC ABATEMENT*, Nos. 569 & 504 (CT. OF SPEC. APP. APR. 27, 2011)



**E**xpressio Unius is the rule that to express or include one thing implies the exclusion of the others. For example, if one were to say "all citizens have the right to vote," under the maxim of *expressio unius* that would mean that non-citizens cannot vote. The Court of Special Appeals in the case of *Sanchez v. Potomac Abatement*, Nos. 569 & 504 (Ct. of Spec. App. Apr. 27, 2011) rejects the maxim of *expressio unius* as it applies to interpreting LE §9-742. This section of the Workers' Compensation Act states that the Maryland Workers' Compensation Commission ("Commission") retains jurisdiction in two instances when a matter is

on appeal: continuing temporary total disability that was awarded by the Commission in the appealed order and medical treatment. The *Sanchez* Court held that this list is not exhaustive. Rather, the general "continuing powers" granted to the Commission under LE §9-736(b) gives the Commission discretion to hear cases on any issue that is brought before the Commission during the period the matter is on appeal as long as the new issue is independent of the issue on appeal.

### Facts

In September of 1998, Mr. Sanchez suffered a job related injury. He received a worsening of his permanent partial disability award in August of 2006. Dissatisfied with how the award was calculated, Mr. Sanchez appealed the matter to the circuit court and the case was eventually decided by the Court of

Appeals in 2010.

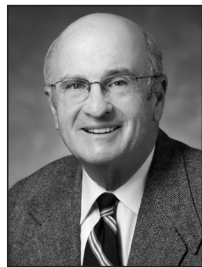
During the period that the matter was on appeal, Mr. Sanchez filed new issues with the Commission for a closed period of temporary total disability and vocational rehabilitation benefits. The Commission declined to exercise jurisdiction in both instances because the matter was on appeal and neither of the issues filed are listed in LE §9-742. LE §9-742 states that the Commission retains jurisdiction on appeal over a request for additional medical treatment and a request for temporary total disability benefits if the temporary total disability benefits were granted in the order on appeal and were terminated by the employer/insurer without an order of court. Since neither the issues filed by Mr. Sanchez (a closed period of temporary total disability or vocational rehabilitation) are listed in LE §9-742, the Commission

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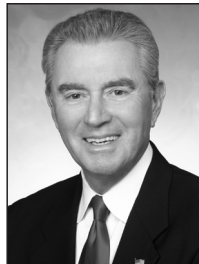
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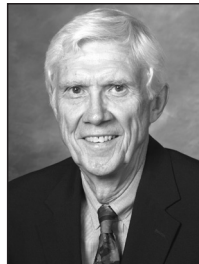
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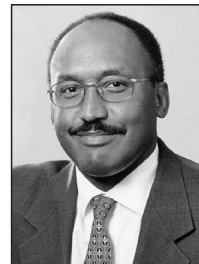
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declined to exercise jurisdiction over the matter while the original issue involving calculation of benefits were on appeal.

Dissatisfied with the Commission's failure to exercise jurisdiction over issues allegedly independent from the matter on appeal, Mr. Sanchez filed another appeal regarding the failure of the Commission to exercise jurisdiction over the temporary total disability and vocational rehabilitation issues. The Circuit Court for Baltimore County affirmed the Commission's decision. Mr. Sanchez appealed this decision to the Court of Special Appeals. In the meantime, the original appeal involving how permanent partial disability benefits were to be calculated had been resolved by a decision of the Court of Appeals in the employer/insurer's favor. As such, the Commission now would take jurisdiction over Mr. Sanchez's issues of vocational rehabilitation and temporary total disability. The appeal pending in the Court of Special Appeals was arguably moot.

## Resolution of the Issues

The two issues on appeal were whether the appeal was moot and whether the Commission had jurisdiction to hear issues not specifically mentioned in LE §9-742 while a claim is on appeal. The Court found that while the appeal was moot, the Court could express its opinions on the jurisdictional issue because it implicates the "public interest." On the jurisdictional issue, the Court found that LE §9-742 is not an exhaustive list of what issues the Commission retains jurisdiction over while a matter is on appeal.

By the time Mr. Sanchez's appeal reached the Court of Special Appeals on the issue of whether the Commission had jurisdiction to hear his issues while he had another issue in the same claim on appeal, the first appeal had been resolved. As such, any impediment perceived or otherwise to the Commission hearing his supplemental issues were removed. Since the Commission would now hear the temporary total and vocational rehabilitation issues, there was no controversy for which the Court of Special Appeals could grant relief. When a matter is moot like this one, the Court of Special Appeals cannot review the case. However, there are two offshoots to this rule that allows the Court to express its views on a moot case without deciding the case: the issue is capable of repetition but evading review and/or the case implicates the public interest.

Wishing to express its views on whether

LE §9-742 provided an exhaustive list of when the Commission had jurisdiction on supplemental issues while a matter is on appeal, the Court of Special Appeals opined that the "public interest offshoot to the mootness doctrine" applied to the *Sanchez* case. This doctrine states that if the public interest will be harmed if the question is not immediately decided, the Court is justified in reviewing a moot issue. In this case, the Court reasoned that the public interest would be hurt if Mr. Sanchez's question was not immediately decided because the Workers' Compensation Act is remedial legislation. The issue involved in this appeal affected both injured workers' rights to prompt compensation for their injuries and the efficient operation of the Commission and the courts. For these reasons, while the matter is moot and is dismissed, the Court of Appeals would express its views on the issue of law presented but not the exact issue raised by the parties.

In reviewing the issue of jurisdiction, the *Sanchez* Court stated that jurisdiction pending appeal is not limited to those matters listed in LE §9-742 (additional medical treatment and continuing temporary total disability payments). Rather, there is a broader statute, LE §9-736(b), that allows the Commission to take continuing jurisdiction over any matter that is "independent and distinct from the issue on appeal." (Slip Opinion p. 17). The existence of this broader statute and the lack of any exclusivity language in §9-742 led the Court to reject the *expressio unius* rule of statutory construction in this case. Instead of finding that the specific instances of jurisdiction granted in LE §9-742 overruled the general "continuing powers of the Commission" language in LE §9-736(b), the Court found that the Commission has mandatory jurisdiction over the issues listed in LE §9-742 and unfettered discretion to hear any other issue that is independent and distinct from the issue on appeal, while a claim is on appeal. It did not matter that the language of LE §9-736 does not mention appeals at all.

## What Comes Next

If this decision is not reversed on appeal, the Court of Special Appeals has reported "its views" on Commission jurisdiction pending appeal. While the views were expressed in a moot case, the case is a reported one. As such, the rule of law derived from this case is that the Commission has no choice but to decide issues of medical treatment and previously ordered temporary total disability benefits

that were cut off during the pending appeal. However, the Commission has discretion to hear all other issues as long as the issue is "independent and distinct from the issues on appeal."

The case that discusses when issues are "independent and distinct from the issues on appeal" is *Pressman v. State Accident Fund*, 226 Md. 406 (1967). This case dealt with an issue of whether the State Accident Fund had given proper notice of cancellation of coverage. In finding that notice was not properly given, the Court of Appeals discussed the Commission's continuing jurisdiction on other issues while a matter is on appeal. As long as the filed issues deal with "aspects of a case that were not dealt with or embraced within a decision on the other aspects which had been appealed," the Commission may take jurisdiction over the matters while an unrelated issue is on appeal. *Id.* at 415-416. The Court does not give much guidance on what is an unrelated as opposed to a related issue.

When presented with issues filed while a matter is on appeal that is not listed in LE §9-742, defense counsel may shield his/her client from its application by pointing out that jurisdiction is merely discretionary and that deciding this case would unduly prejudice the employer/insurer in the matter or that the issues or not independent from the issues on appeal. For example, the Commission makes a finding disallowing an accidental injury claim. The Claimant appeals this decision. Based on the decision in *Sanchez*, the Claimant could file issues for temporary total disability benefits while the matter is on appeal. The argument would be that imposition of temporary total disability would unduly prejudice the employer/insurer. The claim is denied. If the Commission's original decision is upheld, the employer/insurer could not recover the monies ordered for temporary total disability benefits. As such, the Commission should in its discretion not decide the issue.

If the Commission decides to exercise its jurisdiction, the alternative argument is that the issue of temporary total disability is intimately connected with the issue of compensability. As such, it fails the "*Pressman*" test that only allows the Commission to hear issues that are "independent and distinct from the issues on appeal." The defense would argue that until compensability is decided all issues regarding benefits must be denied. Of course, the Commission may see this issue differently and there is no case law on these issues. Even the *Sanchez* Court did

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not decide whether the issues raised by the Claimant fit within the *Pressman* case, because that issue was moot.

Another issue to be aware of is that if an order is issued pursuant to the jurisdiction granted the Commission under LE §9-742(b) and (c), it is deemed a “supplemental order.” As a result, it is automatically subject to review on the pending appeal. If the Commission takes jurisdiction of an issue under LE §9-736(b), there is no provision providing for the automatic review of that issue in the pending appeal. Therefore, there may be two appeals pending consecutively but separately in one claim on “distinct” issues. Any parties dissatisfied with the decision made pursuant

to jurisdiction granted under LE §9-736(b) must separately appeal that order or forego any right to judicial review.

*Wendy Karpel concentrates her practice in workers' compensation litigation and heads the Montgomery County Attorney's Office's Workers' Compensation Unit. She is a graduate of Haverford College and earned her law degree from Tulane University School of Law. She has lectured in on the topic of workers' compensation in many venues and is a full professor at University of Maryland University College. Wendy is a Past President of the Maryland State Women's Bar Association. She has also been included on the Maryland Super Lawyers list and been named by the Daily Record as one of the Top 100 Women in Maryland.*

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## Court of Appeals Restricts Workers' Compensation Act Preemption and Limits the “Prior Bad Acts” Rule to Criminal Cases

Gregory Garrett



In a unanimous decision, the Court of Appeals ordered that a terminated employee be given a new trial, reinstated her negligent hiring and retention claim against the employer, and stated that the provisions of Maryland Rule 5-404(b) do not apply in civil cases. *Ruffin Hotel Corp. v. Gasper*, Md., 111 Fair Empl. Prac. Cas. (BNA) 1488 (2011). The decision was a loss for the defendant, with some potentially far-reaching implications for Maryland employers and the trial of civil cases in general.

The case arose from the events leading up to the termination of Kathleen Gasper's employment. Ms. Gasper was the assistant general manager of The Courtyard By Marriott Gaithersburg-Lakeforest Hotel, which was owned by the defendant, Ruffin Hotel Corporation. Ms. Gasper alleged that her supervisor, Mr. Ahmed, was terminated in 2002 for engaging in “abusive behavior including allegations of assault, battery, discrimination, sexual harassment and fear of retaliation.” Ms. Gasper was hired in 2003, and Mr. Ahmed was rehired by the hotel in 2004 as her supervisor. Ms. Gasper alleged that in 2005, a coworker (Mr. Bridges) “grabbed [her], pinned her against the wall and kissed her twice.” Ms. Gasper com-

plained to Mr. Ahmed about the incident, and Mr. Ahmed allegedly retaliated against her in response to her complaints.

In March 2005, Ms. Gasper's employment was terminated, and she filed suit against Mr. Ahmed and her employer (the hotel). The trial court found that Ms. Gasper's claim for the negligent hiring and retention of Mr. Ahmed was preempted by, among other things, the Workers' Compensation Act. Ms. Gasper then amended her complaint, bringing suit only against the hotel. In her amended pleading, Ms. Gasper sought to recover for (1) “employment discrimination and sexual harassment” arising out of Mr. Ahmed's response to the incident; (2) “retaliation” by the hotel, which culminated in her termination from employment; and (3) “respondent superior,” in which she attributed Mr. Ahmed's conduct to the hotel. The case proceeded to a jury trial. During the trial, Ms. Gasper sought to introduce evidence of Mr. Ahmed's conduct preceding his termination in 2002. The trial court refused to allow the evidence, finding in part that Rule 5-404(b) (which precludes evidence of prior crimes, wrongs and acts) rendered the evidence inadmissible. The jury returned a verdict for the hotel, and the plaintiff appealed. The Court of Special Appeals reversed in part, holding that the jury instruction regarding the cause of Ms. Gasper's termination was erroneous, and that Ms. Gasper's count for negligent hiring and retention should not

have been dismissed. The Court of Special Appeals affirmed the trial court's exclusion of the evidence related to Mr. Ahmed's prior conduct. *Gasper v. Ruffin Hotel Corp.*, 183 Md. App. 211, 960 A.2d 1228 (2008). Both parties appealed, and the Court of Appeals granted certiorari.

The first issue on appeal was whether the trial court had instructed the jury correctly on Ms. Gasper's burden to prove the cause of her termination. Quoting extensively from the Court of Special Appeals's opinion, the Court held that a plaintiff must prove “that her opposition to the harassing conduct was the *motivating* factor in the decision to terminate her employment.” (emphasis in original). Because the trial court's charge included the phrase “substantial factor” rather than “motivating factor,” the Court held that the plaintiff was entitled to a new trial.

The Court also took up the hotel's contention that the employee's claim for the allegedly negligent hiring and retention of Mr. Ahmed was barred by the Workers' Compensation Act, on the basis of the decision in *Newman v. Giant Food, Inc.*, 187 F. Supp. 2d 524 (D. Md. 2004). Very little analysis was given to the issue: “We reject the proposition that the General Assembly intended that the Workers' Compensation Commission is the exclusive forum in which a negligent hiring/retention claim must be litigated whenever such a claim is asserted by an employee against his or her employer as a

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(WORKERS' COMPENSATION) Continued from page 15

result of intentional and unlawful misconduct of a fellow employee. A contrary conclusion would be unreasonable in the extreme.”

Although the Court stated that there was no Maryland authority supporting preemption, it made no mention of its previous decision in *Athas v. Hill*, 300 Md. 133 (1984). In *Athas*, the plaintiff was attacked by a coworker wielding a butcher knife, and sued his managers for negligently hiring the coworker. The Court in *Athas* held that the managers were immune from the plaintiff's tort suit. And in *Suburban Hospital v. Kirson*, 362 Md. 140 (2000), the court characterized *Athas* as a decision in which the managers shared the employer's immunity under the Workers' Compensation Act. Given that there was no substantial discussion of preemption in *Gasper*, it is unclear whether *Athas* and *Kirson* have been overruled sub silentio, whether *Gasper* will be limited to its facts, or indeed, just how far the preemption provided by the Workers' Compensation Act extends. In any event, employers and their counsel should take note of the *Gasper* decision and recognize that the plaintiffs' bar inevitably will seek to push its boundaries. It seems inevitable that more lawsuits will be styled as negligent hiring and retention as a way for

employees to plead around the bar imposed by the Workers' Compensation Act.

In what may be the most far-reaching aspect of its decision, the Court of Appeals addressed the applicability of Rule 5-404(b) in civil cases. The Rule provides: “Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident.” After a review of the history of the Rule, the authorities interpreting the federal analogue, and the opinion in *Lewin Realty v. Brooks*, 138 Md. App. 244 (2001), *aff'd on other grounds*, 378 Md. 70 (2003), the Court stated: “Md. Rule 5-404(b) should continue to be applicable only to evidence offered by the State against the defendant in a criminal case. In civil cases, whether the evidence at issue is offered by a plaintiff or by a defendant, the admissibility of relevant evidence that presents ‘the possibility of unfair prejudice is to be dealt with pursuant to Md. Rule 5-403.’” (emphasis added). For guidance in applying this balancing test, the Court directed the trial courts to its line of case pre-dating the

adoption of Rule 5-404(b), including *Medical Mutual v. Evans*, 330 Md. 1 (1993).

This part of the *Gasper* decision, which requires that the trial court engage in the Rule 5-403 balancing test when confronted with evidence of “prior bad acts” rather than the near-automatic exclusion under Rule 5-404(b), may open the floodgates to evidence that parties in civil litigation typically have presumed to be inadmissible. While it cannot be predicted how a trial court would exercise its discretion in a given case, plaintiffs can be expected to seek the admission of evidence of prior lawsuits against the defendant and defendants may try to introduce evidence that the plaintiff unsuccessfully has filed civil lawsuits in the past, among the countless other forms of “prior bad acts.” Unless the trial courts carefully screen such evidence, *Gasper's* change in the applicability of Rule 5-404(b) raises the potential for confusion of the issues and emotional over-reaction by the jury.

*Gregory M. Garrett is an Associate in the Litigation Department at Tydings & Rosenberg LLP. He practices primarily in the areas of commercial and business litigation, medical malpractice litigation, and health care.*

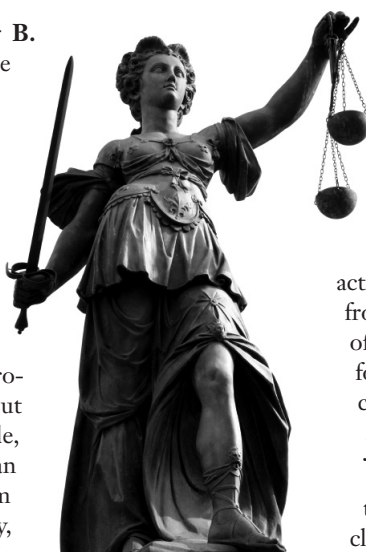
## SPOTLIGHTS

### GDL D Secures Summary Judgment Win in Employment Case Involving Hospital Resident

On February 25, 2011, GDL D attorneys **Craig B. Merkle** and **K. Nichole Nesbitt** convinced the Honorable Evelyn O. Cannon to enter summary judgment in favor of their clients, St. Agnes HealthCare, Inc. and Norman Dy, M.D., in an employment case pending in the Circuit Court for Baltimore City, Case No. 24-C-09-006852 OT.

The case was brought by a first year internal medicine resident, Payam Pojhan, M.D., who was placed on remediation and probation and ultimately encouraged to withdraw from the program after his supervisors expressed concerns about his medical knowledge, his professional attitude, and his ability to care for patients safely. Dr. Pojhan argued that the employment actions against him were motivated by hostility on the part of Dr. Dy, the residency program director, whom Dr. Pojhan contends discriminated against him on the basis of his Iranian nationality and retaliated against him for complaining about his working conditions. Dr. Pojhan also contended that Dr. Dy defamed him by sharing information about Dr. Pojhan's per-

formance with other hospital residency programs. He brought a ten-count complaint alleging a number of tort, contract, and civil rights claims.



Ruling from the bench, Judge Cannon agreed with the defense's position that the hospital and Dr. Dy were immune from liability for the contract and tort claims by virtue of the Health Care Quality Improvement Act, 42 U.S.C. § 11111 (“HCQIA”). She noted that the undisputed facts established that Dr. Pojhan was afforded fair procedures for challenging the employment actions taken and that the decision to terminate him from the program was objectively reasonable in light of the documented concerns about his ability to care for patients. Therefore, Dr. Pojhan's non-civil rights counts could not survive summary judgment.

Judge Cannon went further by holding that even in the absence of HCQIA immunity, Dr. Pojhan failed to establish the facts necessary to support his tort claims.

With regard to Dr. Pojhan's discrimination and retaliation claims, which are not subject to immunity under the HCQIA statute, Judge Cannon agreed with the defense that Dr. Pojhan had not exhausted his administrative remedies by filing a charge of dis-

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## SPOTLIGHTS CONTINUED

crimination with the Equal Employment Opportunity Commission or the Maryland Human Relations Commission. Dr. Pojhan argued that his failure to file a charge of discrimination was due to threats of retaliation by Dr. Dy, and that the defendants should therefore be estopped from citing failure to exhaust administrative remedies as a defense. Judge Cannon disagreed, noting that any alleged retaliation may support his retaliation claim, but does not excuse his failure to comply with mandatory administrative requirements. Judge Cannon went on to find that Dr. Pojhan could not prevail on the merits of his discrimination and retaliation claims, because the undisputed evidence demonstrated the hospital's legitimate, nondiscriminatory basis for the employment actions taken.

Summary judgment was entered in favor of the defendants on all counts.

### GDDL Attorneys Successfully Defend Obstetrical Malpractice Claim by Brain-Damaged Infant

**Craig Merkle** and **Kelly Hughes Iverson** obtained a defense verdict on January 21, 2011 for three obstetricians, two physician assistants, and their obstetrical practice group following a nearly three-week trial in the Circuit Court for Montgomery County, Maryland. In *Eskandary v. RHJN, et al.*, the two-year-old plaintiff's mother suffered a cardiac arrest and died while 40 weeks pregnant. The baby, who was delivered by emergency traumatic cesarean section, was severely brain damaged and now requires, among other things, tracheostomy, tube feeding, and 24-hour nursing care. The plaintiff alleged that in the course of her prenatal care, his mother's obstetricians allegedly failed to refer her for cardiac work-up to identify a congenital heart malformation, which was first identified on autopsy, that led to sudden arrhythmia and cardiac arrest. The plaintiff asserted that diagnosis of the condition should have led to early delivery of the baby before the mother's arrest. The plaintiff claimed damages approaching \$20 million and elicited the testimony of several treating physicians and providers to attest to the child's

global brain injury and profound disabilities. Mr. Merkle and Ms. Iverson presented the testimony of all of the obstetric providers, as well as expert testimony in the fields of maternal-fetal medicine and cardiology, among others. The jury returned a verdict in favor of all six defendants. Mr. Merkle and Ms. Iverson had previously obtained a summary judgment in favor of a fourth obstetrician in the case.

### Bonner Kiernan Obtains Defense Verdict in the Circuit Court for Baltimore City, Maryland — Alleged Medical Malpractice/Wrongful Death

A 53 year old man, Arthur Johnson, developed deep vein thrombosis (DVT) after completing a course of anticoagulant therapy prescribed by a doctor at Johns Hopkins. One of his primary care physicians subsequently placed the patient on a blood thinner to treat the DVT, but Mr. Johnson still went on to suffer from a pulmonary embolism (PE) and died. The decedent's family (including a wife and two adult children) filed a lawsuit against certain physicians involved in his treatment, alleging that Mr. Johnson's pulmonary embolism was a result of the premature discontinuation of anticoagulant therapy and/or improper treatment of the DVT.

Two of the Plaintiff's doctors, represented by E. Phillip Franke and Ace McBride of Baxter Baker Sidle Conn & Jones, were both voluntarily dismissed by the plaintiffs in the middle of the trial. Plaintiffs elected to continue their case against only the doctor from Johns Hopkins, represented by Carolyn Israel Stein and Jason Engel of Bonner Kiernan Trebach & Crociata. After a three week trial, the jury returned a defense verdict in favor of the doctor at Johns Hopkins after 45 minutes of deliberation.

Plaintiffs had sought \$1,200,000 in economic damages, plus non-economic damages for the decedent's alleged pain and suffering and the family member's suffering due to the loss of their decedent.

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