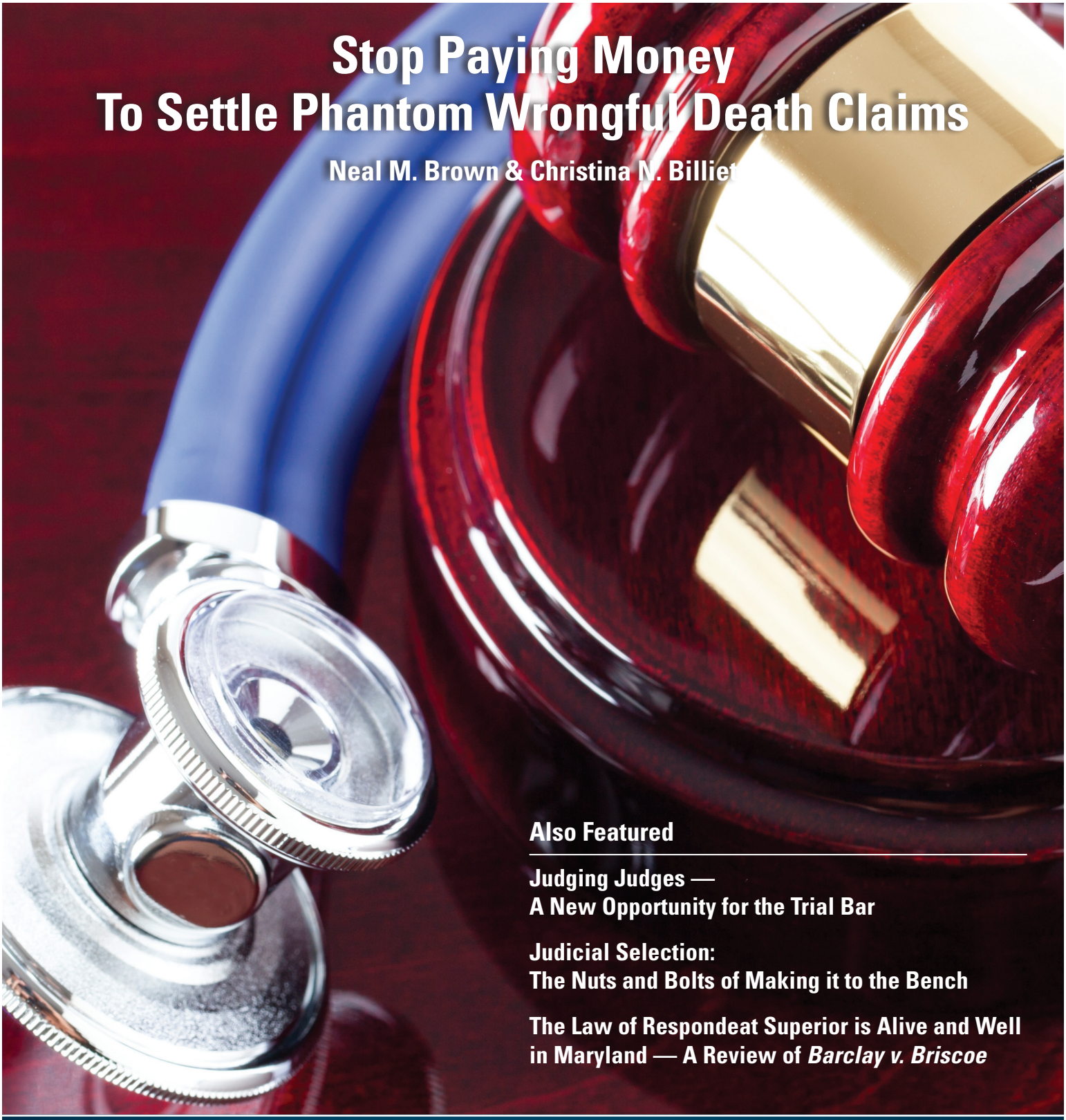
THE DEFENSE LINE

A Publication From The Maryland Defense Counsel, Inc.

Fall 2012

Stop Paying Money To Settle Phantom Wrongful Death Claims

Neal M. Brown & Christina N. Billiet



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The Law of Respondeat Superior is Alive and Well in Maryland — A Review of *Barclay v. Briscoe*

President's Message

50: The Stones, The Beach Boys, The Beltway and MDC

This is what 50 looks like. In 1962, not only did the Rolling Stones and the Beach Boys start recording and touring, but 695 was completed, John Glenn piloted the first orbit around the globe, James Bond first came to the silver screen, and MDC was born. (So was I.)

Mary Malloy Dimaio, Esquire

Maher & Associates

Looking back, our members recall the battles over various tort reform measures, including the caps and the statutory requirements of experts in medical malpractice cases, and the case law they spawned. Contrib and assumption of the risk once had a solid foothold in Maryland law, but attitudes about their roles and viability are changing. Think of how lawyers research, communicate, gather and present evidence now compared to 50 years ago. Think of who "we" are: Diverse by ethnicity, color and gender. It is fitting that the shorthand for our side of the "v." is Δ, Delta, a letter in the Greek alphabet and a mathematical symbol for change. Change is our constant.

I joined MDC as a new lawyer because the people for whom I worked in a small firm in Baltimore were members. Like *pro bono*, it's what was done. I hope it is still that way. For several years, my concept of MDC was a couple of brown bag seminar lunches a year and a fantastic crab feast each June. Only when I joined the Board did I realize how much work goes on. Through our Judicial Selections Committee, we help choose future judges in circuit and appellate courts throughout our state. Our Appellate Committee and others help inform the debate in significant cases on appeal via amicus briefs and oral argument. Through our Legislative Committee and lobbying efforts, we help shape legislation of interest to our members and clients. MDC's hard work has paid off: Our generous sponsors help us bring to fruition quality educational programs to increasing numbers of attendees; we continue to welcome increasing participation in our events by state and federal judges; and members of the local press seek input by our organization on breaking opinions and developing legislation.

We've come a long way. And there's more to do.

Looking forward, we would like to continue to be the reasonable go-to people the legislature, the judiciary and the media rely upon for insight into developing legal issues. We'd like to continue to present the "other side of the story" for consideration in these matters in order to promote justice and fairness. As we develop programs and publications to address how we evaluate and resolve problems in a changing legal environment, we would like to hear from you. What are your ideas and concerns? What can we do for you?

Please give me a call or shoot me an email. We need to get started on the next 50.

Get Involved With MDC Committees

To volunteer, contact the chairs at

www.mddefensecounsel.org/leadership.html.

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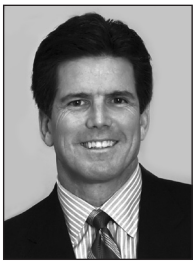
Featured Articles

Columns

Stop Paying Money To Settle Phantom Wrongful Death Claims

Neal M. Brown & Christina N. Billiet



"I need another $50K for the wrongful death part of all this," claims the plaintiffs' lawyer. "After all, with these serious injuries, my client likely will be dead in a year and leave behind the claims of her husband and all 10 kids!"

This is a situation many defense counsel face — your client wants to settle a personal injury case, but plaintiff's counsel presses for more money arguing his client is on her deathbed. A little extra settlement money now will "buy out" the future wrongful death claim. That makes sense. Or does it?

We all know that a wrongful death claim is a separate cause of action that belongs to the family of the injured party; it cannot arise until his or her death. Therefore, plaintiffs suggest, unless the wrongful death action is specifically settled during the settlement process, it remains lurking in the background as a compensable action. Don't fall for it.

Bottom line, once the personal injury lawsuit has been adjudicated or settled, a cause of action for wrongful death for the same wrong no longer exists. There is, therefore, no need to pay "extra" to plaintiffs for this phantom claim.

Why Does This Matter?

This issue arises frequently in serious accident or malpractice claims. For example, suppose you represent a radiologist who allegedly failed to diagnose a mass consistent with metastatic melanoma in his patient's stomach. Several years later, when the personal injury suit is being negotiated, plaintiff sadly has confirmed stage IV melanoma and likely only months to a year to live. At mediation, plaintiff's counsel suggests that the case can be settled only if the dollar amount reflects some compensation for the husband and two minor children, soon to be without their mom/wife.

Or, you represent an insured driver who allegedly caused a near fatal car accident. The plaintiff, severely injured in the accident, likely will never fully recover for her injuries. According to her lawyer, the plaintiff will "probably die before trial," leaving the husband and two minor kids to fend on their own. Plaintiffs' counsel wants to settle the case, but insists that it requires more money than usual since it really should be considered a "wrongful death case, not a simple personal injury case."

In each instance, you point out, correctly, that the injured party is not dead! The plaintiffs chose to file a personal injury lawsuit — not a wrongful death lawsuit. But the plaintiff's lawyer keeps pushing, arguing that unless you pay her what she wants, she will reserve the right to file a wrongful death claim after her clients passing. You think, "do I have a choice;" "I need to protect my client from any future lawsuits."

A Little Background

Some background is helpful. Prior to 1852, the family of a person killed by the negligence of another had no recourse. In that year, the Maryland legislature created an act to "compensate the families of persons killed by the wrongful act, neglect, or default of another person."[1] This act was the precursor to our current wrongful death statute. In 1888, Maryland's first survival statute was enacted. It prevented an injured person's lawsuit from abating at the time of their death and also permitted a personal representative to commence an action subsequent to death.[2]

In the context of these original wrongful death and survivor statutes, Maryland courts began addressing the potential interrelationship between these claims. In *Melitch v. United Railways & Electric Company*, the widow of a man killed in a railroad accident brought a wrongful death action against the railway.[3] Prior to his death, however, the plaintiff's husband had settled his injury claim and executed a release with the defendant "by deed, for valuable consideration."[4] The defendant railway pleaded this release as a complete bar to the widow's wrongful death action. Judge Harlan of the Court of Appeals framed the question as follows:

> The sole question presented by the record is this: Does the release constitute an effectual bar to a recovery in this case?[5]

Judge Harlan's answer was yes — the right of the relatives is contingent on the death of the injured person ***without having satisfied his claim for damages***.[6]

A Wrongful Act — And When It Disappears

The venerable nature of the ruling by Judge Harlan notwithstanding, Maryland courts have repeatedly reaffirmed the position.[7]

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[1] Benjamin v. Union Carbide Corp., *162 Md. App. 173, 187, 873 A.2d 463, 471 (2005)* aff'd sub nom. Georgia-Pac. Corp. v. Benjamin, *394 Md. 59, 904 A.2d 511 (2006).*

[2] Id. *at 187.*

[3] Melitch v. United Rys. & Elec. Co. of Baltimore, *121 Md. 457, 88 A. 229 (1913).*

[4] Id. *at 229.*

[5] Id.

[6] Id. *at 230. In coming to this conclusion, Judge Harlan took guidance from Lord Blackburn's opinion in* Read v. Great Eastern Railway Company, *3 Queen's Bench. In that case, a widow sought to bring an action for wrongful death despite the fact that the husband had already "compromised his claim against the railway company" before dying of the same injuries. Lord Blackburn reasoned that "since the settlement made by the husband would have precluded [the husband] from recovering 'if death had not ensued,' the widow by the terms of the statute could have no better right." Judge Harlan noted that the interpretation of Lord Campbell's Act "has been, without question, uniformly followed by the English courts; and,* if we are to be guided by the construction placed upon the statute by those courts, the release set up in this case constitutes a complete bar to the action." *(emphasis added).*

(WRONGFUL DEATH CLAIMS) *Continued from page 5*

The reasoning has, however, changed. Courts get there through construction of the requirement that an action for wrongful death requires a showing of a "wrongful act."[8]

A "wrongful act" encompasses "an act, neglect, or default including a felonious act."[9] In addition, however, the wrongful act must have "***entitled the party injured to maintain an action and recover damages if death had not ensued***."[10]

Maryland courts have interpreted the second part of this definition to mean "that the decedent must have been able to maintain a compensable action ***as of the time of death***.[11] In other words, in order for an act to be wrongful, the decedent must have had a compensable action at the time of death." If a defense to the decedent's action existed prior to death — such as prior settlement or adjudication of the claim — then there can be no "wrongful act" and by extension no wrongful death action.[12]

In each of the examples discussed above, the plaintiff settled her personal injury lawsuit prior to her death. As a result, she no longer has a "compensable cause of action" because, on her death, there is no viable "wrongful act." Thus, at the time of her death, a "wrongful act" to support a claim by her family for wrongful death would not exist.

In Sum...

Happily for defense lawyers, Maryland law already protects your client from having to defend a wrongful death claim after a personal injury has been settled or tried. We hope this analysis assists you in negotiations with plaintiffs' lawyers, and gives you (and your clients!) some peace of mind when refusing to pay more to settle that phantom wrongful death claim or the right to insert wrongful death language into the release without paying more![13]

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[7] *Md. Code Ann., Cts. & Jud. Proc. §§ 3-901*, et seq.

[8] Benjamin, supra, *at 188*.

[9] *Md. Code Ann., Cts. & Jud. Proc. § 3-901(e);* see also, Benjamin, supra, *at 188*.

[10] Id.

[11] Id. *at 188-89*.

[12] Id. *at 189*.

[13] *Notwithstanding the above, it is still our practice to include in Settlement Agreements form language releasing our client from any future liability relating to the death of the injured plaintiff, including any wrongful death claims. We just don't pay "extra" to do so!*

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 Neal M. Brown and Christina N. Billiet of Waranch & Brown, LLC, provides insight into settlement and the decision to include wrongful death language into the settlement release. An article by James L. Thompson discusses the features of a website that was developed to evaluate trial judges. Tony W. Torain, II of Semmes, Bowen & Semmes provides an overview of what it takes to become a judge. Finally, Donna E. McBride of Miller, Miller & Canby writes about the law of respondeat superior in Maryland.

The Maryland Defense Counsel has had a number of successful events since the last edition of *The Defense Line*, including the always popular **Past Presidents Reception**. Mark your calendars now for Maryland Defense Counsel's **Trial Academy**, which will take place on April 11, 2013! The Editors encourage our readers to visit the Maryland Defense Counsel website (www.mddefensecounsel.org/events) 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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Judging Judges — A New Opportunity for the Trial Bar

James L. Thompson

Recently, I became aware of a website called "TheRobingRoom.com." I had been retained as co-counsel in a litigation case pending in the Circuit Court for Montgomery County, Maryland. My co-counsel, from out of state, asked me about the judge to whom the case had been specially assigned. Frequently out-of-state counsel who know me will call me to give them "book" on a judge to whom their case is assigned. Those of us in the trial bar realize that "book" is a trial lawyer's assessment of a particular judge, in particular those qualities, habits, peculiarities and other issues they bring to the trial of any case before them. Do they read the memoranda? Do they have an even-handed approach to the trial of the case? Do they possess good judicial temperament? Are there issues or peculiarities that one should know about before appearing before this particular judge? Hence, in the case in which I was involved, I gave the out-of-state lawyer the book on the judge to whom our case was assigned. He laughed, and said that was exactly what TheRobingRoom.com says about the judge. He then proceeded to explain what TheRobingRoom.com was — a site by lawyers for lawyers to develop accurate data to evaluate their trial judge before litigation begins. It is an independent website run by North Law Publishers, an attorney-owned company based in New York. The company publishes written materials for trial lawyers and collects data and evaluations from lawyers on all of the federal district court judges, and most of the state trial court judges in 32 states in the United States. After our conversation, I visited the website.

In addition to comments on the federal district court judges, TheRobingRoom.com invites comments — both good and bad — from trial counsel on any trial judge at the Circuit Court level in Maryland and in 31 other states. Trial lawyers in criminal and civil cases are asked to rate the judge from 1 to 10 on a list of general rating criteria which have been thoughtfully considered, such as temperament, scholarship, industriousness, ability to handle complex litigation, punctuality, general ability to handle pre-trial matters, general ability as a trial judge, and flexibility in scheduling. With respect to criminal judges, the rating criteria include even-handedness in criminal litigation, general inclination regarding bail, involvement in plea discussions, general inclination in criminal cases pre-trial stage, general inclination in criminal cases trial stage, and general inclination in criminal cases sentencing stage. Finally, in the civil rating area, it includes even-handedness in litigation and involvement in settlement discussions. As to each of these criteria, general and specific, the judges are rated on a scale of 1 (awful) to 10 (excellent). In addition, the trial lawyer is requested to include comments which, in many cases, are the most interesting of all. Thus, if a judge receives a number of comments and all of them have a common thread, then you — as a prospective trial lawyer appearing before that judge — can make certain decisions as to how you should proceed. Once a judge on the Circuit Court receives three or more ratings, those ratings are posted on the website, and the judge is then ranked alongside his or her peers on the bench. The ten highest-ranked are categorized as the ten best in the state, and the ten lowest-ranking are categorized as the ten worst.

When I first discussed the site with several colleagues, some of the judges and some lawyers were critical of the website because the website does not require lawyers making comments to publish their names. However, the identification of the rating attorneys and other litigants, if provided, are kept confidential in order to encourage frank expression and protect commenters from any possible retaliation should their comments be critical of a given judge. This is particularly important in a small-town community like those that exist in various parts of this state. However, the concern about non-disclosure of the commenters' identities is alleviated when one sees that, once a number of separate comments are made about a given judge, a pattern can often be discerned. For example, multiple comments may note that the judge interferes with counsel in the presentation of the case, pre-judges the case before the evidence has been introduced, or intimidates the witnesses. Clearly, such conduct and behavior by any trial judge detracts from and interferes with the justice system. Behaviors such as that go a long way to explaining why the public, from time to time, loses its trust and confidence in the justice system.

I am on a judicially appointed committee entitled "The Public Trust and Confidence Implementation Committee for the State of Maryland." It is comprised of four judges including the Chief Judge of the Maryland Court of Appeals, four practicing lawyers including three past presidents of the bar, The Executive Director of the Legal Aid Bureau and the founder of the Maryland Crime Victims Resource Center. We are evaluating this website (and any other credible websites) to see what lessons we, and the judges who are reported on, can gain from this information. If any judge in Maryland is consistently rated as having negative behavioral characteristics, can they be re-trained? Can our judicial institute utilize this information to design education for new judges taking the bench in Maryland? These are matters which we are evaluating at the present time, but we also invite you to consider them.

Check out the website: **www.therobingroom.com**. If you have a matter before any of the Circuit Court judges in Maryland, please consider reporting your evaluation, favorable or unfavorable, to TheRobingRoom.com so that a greater body of data is accumulated. The broader the base of data, the better quality the data will be. As a part of this process, Chief Judge Robert M. Bell, without endorsing this web site, sent out a memorandum to all appellate, circuit and district judges in the State of Maryland dated May 25, 2012, in which he advised all of the judges in Maryland of the existence of this site and the rating criteria which it employs. His purpose in sending the memorandum was to make each judge aware of the site and to suggest that "a review of the site may be advisable and useful, especially as it pertains to you." I, in turn, have requested the Maryland State Bar Association in a letter of May 14, 2012 and other bar associations and sources to invite lawyers and litigants to comment through this website on their litigation experiences (both good and bad) in the State Circuit Courts in an effort to improve the service to the public. It is clear that the broader the base of the comments by the trial bar, the more reliable will be the conclusions which can be derived from it.

It would be my hope that we can utilize the materials which are posted on the website to help improve our system of justice. However, several things are clear:

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Judicial Selection: The Nuts and Bolts of Making it to the Bench

Tony W. Torain, II

Have you ever wondered what it takes to become a judge? No doubt, the judiciary plays an integral role in the legal system. The Preamble to the Maryland Code of Judicial Conduct states, "It is fundamental to our legal system that our law be interpreted by a competent, fair, honorable, and independent judiciary. Such a judiciary is essential to the American concept of justice." Judges serve as impartial, unbiased mediators and interpreters of the law in trials and other adversarial venues. In some cases, judges operate as fact-finders with the power to determine the rights and duties of litigants. They are guardians of the rights of all who come before them.

So, how does one become a judge? District 4 of The National Association of Women Judges ("NAWJ"), which includes Maryland, the District of Columbia, and Virginia, held a forum on January 26, 2012 at Semmes, Bowen & Semmes' Baltimore office where that important questioned was analyzed. Judge Claudia Barber, the director of District 4 and an Administrative Law Judge (ALJ) in the District of Columbia, assembled a distinguished panel of sitting judges and other lawyers involved in the judicial nominations process, which sought to demystify the ascension to a judgeship for the audience. The attendees included attorneys, both male and female, and all ages and levels of practice. At the forum, the panelists informed aspiring judges on the nuts and bolts of judicial selection.

Judge Barber started the forum by explaining the rich history of NAWJ. Founded in 1979, the NAWJ focuses on increasing diversity in the judiciary. The association promotes an awareness of the importance of having a diverse bench and bar. After Judge Barber's comments, Judge Ellen Hollander, who sits on the United States District Court for the District of Maryland, gave opening remarks.

Judge Hollander began by emphasizing the value of gender diversity in the judiciary and giving the history of gender diversity in Maryland's legal community. She noted that in 1901, Henrietta Maddox was the first women to graduate from Baltimore Law School. After graduating from law school, Maddox applied for admission to the bar with the Maryland Court of Appeals. Unfortunately, Maryland's highest court denied her application because of her gender. Determined to practice law, Maddox appeared before Maryland's General Assembly, along with other female attorneys from across the country, to persuade the Legislature to pass a bill to allow women to practice in Maryland. In 1902, the General Assembly passed the law, and Maddox, who passed the bar exam with flying colors, was admitted to the Maryland Bar.

Judge Hollander also recognized Kathryn J. DuFour, the first female judge in Maryland. Women like Maddox and DuFour have paved the way for gender diversity in the legal profession. Judge Hollander noted the role of women jurists in combating domestic violence, in the development of the "battered women's syndrome" defense, and in facilitating family law cases involving children.

After Judge Hollander's inspiring remarks, a lively panel discussion ensued. Judge Marcella Holland, Administrative Judge of the Circuit Court for Baltimore City, was the forum's moderator. The panelists included: Judge Judith Dowd of the Federal Energy Regulatory Commission, Associate Judge Angela Eaves of the Circuit Court for Harford County, Charles Fuller, Esquire of the Howard County Judicial Nomination Commission, Chief Special Master Patricia Campbell-Smith of the U.S. Court of Federal Claims, and Marisa A. Trasatti, Esquire, Principal at Semmes, Bowen & Semmes and Co-Chair of the Maryland Defense Counsel Judicial Selections Committee.

Marisa Trasatti, Esquire, began the panel discussion by explaining Maryland Defense Counsel as an entity. She noted that Maryland Defense Counsel is a civil defense association seeking to improve the quality of justice. She discussed the qualities that Maryland Defense Counsel's Judicial Selection Committee seeks in a judicial candidate and stated," We want the best candidates on the bench," and "We want to ensure the fair and efficient administration of justice." Ms. Trasatti also provided the attendees with a "cheat sheet" of questions asked of candidates who apply for trial court and appellate bench positions.

Next, Judge Judith Dowd explained the requirements for becoming a federal ALJ. "The selection process is a merit based system. You don't have to worry about being too political," Judge Dowd explained. To become a federal ALJ, you must be an active member of the bar, in good standing, and have at least seven years experience in litigation. According to Judge Dowd, you have to keep a record of cases you handled and be prepared to discuss the extent to which you were involved. In addition to the application to Office of Personnel Management, an applicant must take a written exam, which simulates the composition of an opinion, and attend an interview.

Attendees next had the privilege of hearing the first African American Panamanian native and second female judge to ever serve on the Circuit Court for Harford County, Judge Angela Eaves. Judge Eaves mentioned her anxiety in running for the Circuit Court bench in Harford County, predominantly conservative and less diverse area. She overcame her fears by embracing her differences and being visible in the community. "Get involved in the community," Judge Eaves remarked. Judge Eaves also left the audience with three important things to remember for becoming a judge. First, Judge Eaves admonished aspiring judges to enhance their problem-solving skills. Second, it is important to have patience with litigants and attorneys. Finally, candidates for the judiciary must always be prepared to make a just and fair decision. These traits make for exemplary judicial temperament.

Chief Special Master Pamela Campbell-Smith, who sits on the Court of Federal Claims, emphasized ways in which her science and engineering background and extensive clerkship experience helped her on her quest to the bench. In 1991, she served as an extern to Judge John Minor Wisdom on the United States Court of Appeals for the Fifth Circuit. She had also clerked for three other federal judges. While in law school, Chief Special Master Campbell-Smith worked in an environmental law clinic for half of a summer and worked for Exxon Mobile in the second half. "Diversity of experience will help you see both sides of the case." In the context of which court or administrative body candidates should select in their pursuit of a place in the judiciary, she stated, "Focus on where the trends are going."

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(JUDICIAL SELECTION) *Continued from page 11*

Finally, the sole male on the panel, Charles Fuller, Esquire of the Howard County Maryland District 9 Judicial Nominating Commission addressed the audience. Mr. Fuller discussed the qualifications his Commission seeks when they present the "short" list of candidates to the Governor. "We investigate every piece of information. If you have a problem with another attorney, get it right if you can," Mr. Fuller stated frankly. Each candidate completes questionnaire, and the Commissioner begins the investigation. Then, each Commissioner is assigned an applicant and performs a background check on that applicant based on his or her questionnaire. Copies of that questionnaire are also provided to state and local bar associations. Mr. Fuller also noted that the Commission's proceedings are strictly confidential. After the investigation, the Commission has a secret vote and submits a "short" list of candidates to the Governor. Finally, Mr. Fuller stated the importance of joining various bar associations, specifically specialty bar associations, like NAWJ and the Women's Bar Association.

How does one become judge? In addition to years of experience in the courtroom, becoming a part of the community, following the trends, pursuing diverse opportunities, and maintaining a reputation of collegiality certainly help. It is important that the members of the judiciary at large possess these qualities to ensure that litigants and advocates can present their disputes to a "fair and independent judiciary." It is also important to have diversity in the judiciary. Diversity on the bench ensures the full consideration of the interests of the entire community. Ultimately, aspiring judges must "honor and respect the judicial office as a public trust and strive to enhance and maintain public confidence in our legal system," as stated in the Preamble to Maryland's Code of Judicial Conduct.

Tony W. Torain, II is an associate in Semmes, Bowen Semmes' Workers' Compensation and Employers' Liability practice.

Expert Information Inquiries

The next time you receive an e-mail from our Executive Director, Kathleen Shemer, containing an inquiry from one of our members about an expert, please respond both to the person sending the inquiry and Mary Malloy Dimaio (mary.dimaio@aig.com). She is compiling a list of experts discussed by MDC members which will be indexed by name and area of expertise and will be posted on our website. Thanks for your cooperation.

To check out the **MDC Expert List**, visit **www.mddefensecounsel.org** and click the red "Expert List" button in the left hand corner of the home page or access it from the directory menu.

(JUDGING JUDGES) *Continued from page 9*

1. The judges ***are*** being judged every day and this process will continue and expand.[1]

2. The comments, both good and bad, about the judges should be evaluated by all of the players in the judicial system, including the litigants, their counsel, the Public Trust and Confidence Committee and the judges themselves. Credible comments which reflect a pattern of conduct which is detrimental to the public trust and confidence in the judicial system should cause the conduct to be changed by holding up a mirror for the judges. They can change. Likewise, the judges that receive positive feedback should be recognized.

3. If appropriate data exist[2] and the judges with poor ratings and conduct are unable or unwilling to modify their conduct and judicial demeanor to acceptable levels, then they should be re-educated, reassigned, or referred to the Judicial Disabilities Commission for appropriate action. Individual judges should not be permitted to use the courtroom to inflict substandard justice on the litigants who appear before them.

In conclusion, TheRobingRoom.com was set up to provide "book" to lawyers by lawyers about judges in each of the states. This data needs to be broad-based and accurate as a professional and commercial matter for it to be reliable. This same information will be useful to the judiciary and to the several bar associations and disabilities commissions as well. The purpose of this paper is to stimulate our thinking and, to the extent you try cases, to encourage you to participate and make comments about the way the Circuit Court judges in Maryland operate. In the end, this will help all of us — the trial lawyers, the litigants, and the judges — to the end that the public has improved trust and confidence in our judicial system.

The Maryland Defense Counsel, Inc. ("MDC") is not an advocate of this website but believes that the article is thought provoking and that the issues raised deserve discussion within the legal community at large, as well as within MDC.

Mr. Thompson has over forty years of experience as a trial lawyer, is a Fellow in the American College of Trial Lawyers, was a past president of the Maryland State Bar Association and serves on the Judiciary's Public Trust and Confidence Implementation Committee. His views expressed here are his own, and he has no personal or financial interest in North Law Publishing Company or their website.

1 Judicial evaluation, judicial polls and judging the judges have historical antecedents in Maryland. Surveys were conducted by the Maryland State Bar Association, the Section on Judicial Administration and the Baltimore Sun regarding the Supreme Bench of Baltimore City, in February, 1975. Thereafter, the Section on Judicial Administration sought to continue the efforts to conduct surveys of trial courts in other areas of the State. The Committee on Judicial Polls was appointed and chaired by Marvin Steinberg. The Washington Star agreed with the committee and the council to jointly sponsor and conduct a statistically accurate survey of the trial courts in the sixth and seventh judicial circuits similar to that undertaken for the Supreme Bench of Baltimore City. The Star poll results were published in the December, 1980, with the headline: "Study Rates the Best and Worst Jurists." These were anonymous polls of practicing lawyers regarding judicial performance. The latter poll was taken under the direction of M. Peter Moser, President of the Maryland State Bar Association. These polls, although valuable at that date, were static, time consuming, expensive and did not have any lasting impact on the conduct of the judges who were rated poorly. With the new technology available on the internet and the access to TheRobingRoom.com on a 24-hour per day basis, this opens a new opportunity for the trial bar to have a meaningful impact in the process which is fluid and timely. Judges are rated every day. Also "Court Smart," a sound recording system, is now in place in all District Courts in Maryland, and most of the Circuit Courts have it as the system expands. This allows a periodic sampling of the court proceedings and some verification of reports of verbal misbehavior.

2 Some of the comments and ratings on the website about a judge appear to be result oriented — I lost the case therefore the judge is bad. Those should be discounted. However, other factual comments made about the judge's poor conduct at trial which is witnessed by other attorneys and litigants in other criminal and civil cases are very important. If credible/appropriate data of this sort develops in 5 to 10 cases or more, then it should be called to the judge's attention and remedial action suggested.

The Law of Respondeat Superior is Alive and Well in Maryland — A Review of *Barclay v. Briscoe*

Donna E. McBride

Employers can breathe a sigh of relief following the Court of Appeals June decision in *Barclay, et. ux. v. Briscoe, et. al.*, an opinion that affirmed an earlier Court of Special Appeals decision issued last year. In Barclay, the high court declined to extend liability to employers for negligent acts of its employees that occur outside the scope of the employer's business.

Factual and Procedural Background

On January 17, 2006, Christopher Richardson, a longshoreman working for Ports America Baltimore, Inc. ("Ports") was driving home from work in his personal automobile, after working a 22 hour shift. Richardson fell asleep at the wheel, crossed the center line and collided head-on with Sgt. Michael Barclay of the Anne Arundel County Police Department. As a result of the collision, Richardson died and Barclay suffered severe injuries.

Richardson had voluntarily worked a 22 hour shift in order to assist in the unloading and loading of a ship that was behind schedule. He was not required to work the additional hours, but had elected to do so.

Following the accident, Barclay filed a complaint in the Circuit Court for Carroll County naming as defendants Richardson's Personal Representative (Briscoe) as well as Ports and two other trade associations. In addition to the negligence claim against Briscoe for Richardson's actions, Barclay alleged that Ports, et. al. were vicariously liable for Richardson's negligence under the doctrine of *respondeat superior*. Barclay also alleged that Ports was primarily negligent by failing to prohibit or by encouraging employees to work an excessive number of hours.

In response to the lawsuit, Ports and the trade defendants filed a motion for summary judgment which was granted by the Circuit Court. The trial judge reasoned that with regard to the claim of vicarious liability under the theory of respondeat superior, an employer is only liable when the employee is using his vehicle while carrying out the duties of his employer at the time of the accident. As to the argument that Ports was primarily negligent, the trial court found that the employer had no duty to protect third parties from fatigued employees acting outside the scope of their employment in the absence of a "special relationship." Such a "special relationship," the judge reasoned, only arises if an employee commits a tortious act on the employer's property or when using the employer's chattel.

The Plaintiff appealed the trial court's decision to the Court of Special Appeals which affirmed. The Court of Appeals granted Barclay's Petition for *writ of certiorari* and in doing so, addressed three questions:

> 1. Did the Circuit Court err in granting the motion for summary judgment when disputes of material fact existed?
>
> 2. Can an employer be vicariously liable, under the "special circumstances" exception to the coming and going rule, for injuries suffered by a third party when an employee falls asleep at the wheel while driving home from an unreasonably long shift?
>
> 3. Do employers owe a duty to the motoring public to ensure that an employee not drive home when an extended work schedule caused sleep deprivation, increasing the likelihood that the employee could fall asleep at the wheel and cause injury to a third party?

Decision

As to the first question, the high court found that the disputes of fact were not material and therefore summary judgment was appropriate. Concerning the second question, whether the employer could be held vicariously liable, the Court also agreed with the intermediate appellate court finding no liability on the part of the employer under the circumstances of this case. The Court went on to state that "on the job fatigue is not a 'special circumstance' sufficient to prevent application of the general rule that an employer will not be vicariously liable for the negligent conduct of his employee occurring while the employee is traveling to or from work. (quoting *Dhanraj v. Potomac Electric Power Co.*, 305 Md. 623, 628, 506 A. 3d. 224, 226 (1986)). The Court explained that in order to show a "special circumstance," one must prove that the employee is not simply commuting to or from work, but is also using his or her own personal vehicle — authorized by the employer — to engage in the execution of his duties on behalf of the employer. Therefore, even if Ports had forced Richardson to work for an unreasonable amount of time, that alone is not sufficient to impose liability on the employer.

Barclay's second argument — that Ports was primarily liable — as opposed to vicariously liable — was also rejected by the Court. Barclay argued that Ports had a duty "because the risk a fatigued employee poses to the public is foreseeable and the fatigue arose within the scope of [Port's] employment relationship with Richardson." The Court refused to conflate "foreseeability" with "duty" stating that while foreseeability is an important factor in determining whether a duty exists, "[t]he fact that a result may be foreseeable does not itself impose a duty in negligence terms." In so ruling, the Court followed the Restatement (Second) of Torts § 315 which states that there is no duty to control the conduct of a third person so as to prevent harm to another unless a "special relationship" exists either between the actor and the third person which imposes a duty on the actor to control the third person, or there is a "special relationship" between the actor and the third person which gives the third person a right to protection. The employer must affirmatively exercise control over the employee for a duty to arise.

The Court of Appeals rejected Barclay's urging to adopt the Restatement (Third) which defines special relationships that give rise to a duty as including an employer with employees when the employment facilitates the employee's causing harm to third parties. In other words, the Court declined to expand liability to instances that might be considered a "moral duty."

Although a very small minority of States have imposed such a duty on employers in cases such as this, it clear that our current Court is not inclined to do so.

Donna McBride is a partner in Miller, Miller & Canby's Litigation practice group. In her two decades of

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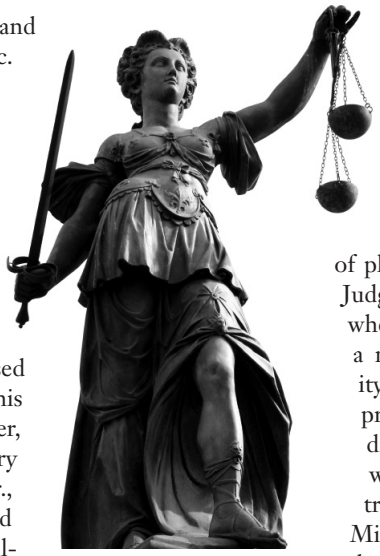
Spotlights

Venable attorneys win in Maryland Court of Special Appeals

A Venable team consisting of **Craig Thompson** and **Michael De Vinne**, representing Attransco, Inc. recently won an important matter before the Maryland Court of Special Appeals, further erasing a damaging jury verdict that was reported by a number of legal publications.



Appellant, Leroy Conway Jr., originally filed a complaint for damages against Attransco, Inc., in the Circuit Court for Baltimore City. The complaint sought money damages arising out of Conway Jr.'s diagnosis with mesothelioma. Conway Jr. alleged that his mesothelioma was caused by exposure to asbestos dust brought home on his father's clothing after work on the Baltimore Trader, a merchant vessel owned by Attransco. On January 26, 2010 the jury returned a verdict for Conway Jr., and awarded him close to $10 million for past and future non-economic damages, and nearly one million dollars for past and future economic damages. Attransco then filed a motion for judgment notwithstanding the verdict ("JNOV"), and the Circuit Court entered an order granting the motion and entering judgment in favor of Attransco. Conway Jr. appealed.

Thompson and De Vinne represented Attransco during the appeal, and persuaded the Court of Special Appeals to affirm the ruling of the Circuit Court.

Miles & Stockbridge Secures Summary Judgment For Manufacturers in Contingent Business Interruption Insurance Coverage Case

In a 51-page Memorandum Opinion, the Honorable Ellen Hollander held that Millennium Inorganic Chemicals Ltd. and Cristal Inorganic Chemicals Ltd. (collectively "Millennium") were entitled to insurance coverage for a business interruption loss arising from an explosion that shut down operations at their titanium dioxide manufacturing facilities in Western Australia. *Millennium Inorganic Chems. Ltd, et al.. v. National Union Fire Ins. Co.* of Pittsburgh, PA., et al. No. ELH-09-1893, 2012 WL 4480708 (D. Md. Sept. 28, 2012). At issue in the case were "All-Risk" property insurance policies issued by defendants National Union Fire Insurance Company of Pittsburgh, PA and ACE American Insurance Company. The policies provided contingent business interruption coverage to Millennium in situations where Millennium's operations were shut down because of physical damage to a "direct contributing property." Judge Hollander held that the policies were ambiguous when applied to Millennium's loss, which arose from a major explosion at a natural gas production facility. She further held that no extrinsic evidence was produced to explain the ambiguity either way, that no dispute of material fact existed, and that Millennium was accordingly entitled to coverage under the doctrine of *contra proferentem*. A trial on damages—which Millennium claims exceed $10 million—has been scheduled for February, 2013. Millennium is represented by Miles & Stockbridge lawyers **Joseph L. Beavers, John C. Celeste**, **Gary C. Duval**l, and **Jeffrey P. Reilly**.

Peggy Fonshell Ward, of Ward & Herzog, won a summary judgment motion in the Circuit Court for Montgomery County in a near drowning case. The case arose from a three year old boy gaining access to a closed, fenced, chained and padlocked swimming pool at the apartment complex where he lived. When removed from the pool he was without pulse or respirations. He was revived, but left with severe anoxic brain injury. Plaintiff originally filed the case in Baltimore City, but Ms. Ward was successful in having venue transferred to Montgomery County where the event occurred. Judge Louise Scrivener granted the defendants' motion, which asserted that regulations regarding allowable space in the pool fence did not apply to a pool and fence constructed twenty years before the regulations were enacted, and also asserted that the child was a trespasser to whom the apartment complex owners and managers owed no duty.

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practice, she has tried hundreds of lawsuits throughout the state of Maryland and in the District of Columbia. Her trial practice is diverse and extensive. She has played leading roles in complex commercial disputes for large corporate clients and in other areas such as employment disputes, insurance related litigation, zoning and land use matters and in trust litigation. Additionally, she has expertise in acting as divorce trustee, assisting in presenting sound options for disposition or allocation of trust property when trustees involved are going through a separation or divorce. All her areas of practice concentration have involved difficult and novel issues that her extensive courtroom experience enables her to navigate with success.

In addition to her extensive background as a trial lawyer, Ms. McBride is a co-chair of the Maryland State Bar Association's Judicial Selections Committee, serves on the Character Committee for the Court of Special Appeals, and is a member of the Montgomery Inn of Court and volunteers as a mediator for the District Court.

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