THE DEFENSE LINE

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Fall 2013

Insurance Coverage for Government Investigations: What Constitutes a "Claim?"

Joseph L. Beavers & Lee Crofton Douthitt

Also Featured

MDC: A Storied Past and a Bright Future

I recently learned one of the very first honors that you experience as MDC President is sending out the invitations to the Past President's Reception, which my firm will be hosting next month. Reflecting on the list of past presidents, I was reminded of the old Sesame Street song "One of These Things (Is Not Like the Other)." I seriously struggle to see how in only a year's time I will belong on this list of titans of the Maryland defense bar. Fortunately for me (and MDC), I only have a year in this position and could not possibly mess things up too much in that short time period. This is important because there is so much to be proud of about MDC's storied history and its bright future.

Toyja E. Kelley, Esquire

Tydings & Rosenberg LLP

Over the past 50 plus years, MDC and its members have found themselves on the winning side in many battles such as the nearly annual fight to replace contributory negligence with comparative negligence, efforts to eliminate restrictions on punitive damages, proposals to eliminate damages caps on certain personal injury claims, and reducing requirements for expert testimony, among others. Although we have lost our fair share along the way as well, the efforts of our members against what is often times a better funded and more visible opponent in the Maryland Association for Justice should really be commended.

Recently, MDC came out on the winning side in one of these battles in *Coleman v. Soccer Association of Columbia*, a case that many thought might sound the death knell for contributory negligence in Maryland. MDC Past President Gardner Duvall deserves special recognition for his contributions in unprecedented proceedings before the Rules Committee of the Maryland Judiciary and the Court of Appeals with respect to this most recent effort to challenge contributory negligence in our State. In addition to his work before the Rules Committee, Gardner was instrumental in the preparation of MDC's Amicus Brief and at oral arguments in the *Coleman* case. On July 9, 2013, the Court of Appeals re-affirmed its decision of thirty years ago that adoption of comparative fault would be a legislative role properly left to the state's General Assembly. I have heard many say that we dodged a very real bullet.

Looking forward, we should all be pleased with the direction that the organization is heading. MDC's legislative efforts are particularly noteworthy. During my time on MDC's Board, much attention has been paid to our legislative efforts in Annapolis. Today, I have no doubt that state legislators seek out MDC for its input on issues that affect the civil justice system in Maryland more than any other time in our organization's history. Gardner, along with Chris Boucher and MDC lobbyist John Stierhoff, among many others, deserve a great deal of thanks for the state of MDC's influence in Annapolis.

We should also be proud of our amicus brief program. MDC's Appellate Practice Committee is headed by Richard Flax, Dwight Stone, and Chris Heagy. They are responsible for receiving, vetting, and making recommendations to the Executive Committee on which cases are noteworthy and appropriate for MDC to support a particular defense position. As a part of its amicus program, MDC looks to make meaningful and original arguments that could result in a contribution to civil jurisprudence in our State. The success of this program can be seen in the increasing number of requests for MDC's participation. MDC, of course, cannot file briefs in every case from which it receives requests. As demonstrated by the *Coleman* case, however, our impact is undeniable.

MDC's role in the judicial selection process also deserves recognition. The Judicial Selections Committee has for some time now been headed by Marisa Trasatti and John Sly. Marisa, John, and their committee interview most of the candidates for each vacancy on Maryland's courts. The impact of their efforts can now be seen in the number of requests we get from candidates asking that we interview them and the number of judges currently on the bench whom MDC has had an opportunity interview and vet.

One of my goals for the next year is to see more activity from MDC's Substantive Law Committees. At our first Board Meeting in September, I will be challenging each Committee to come up with a set of goals and objectives for the coming year. There are many opportunities to publish articles and present at Brown Bag lunches or at MDC's Annual Trial Academy. In three short years, MDC's Trial Academy has become a real high water mark for the organization. It has been a sell out each year and the reviews from attendees have been very favorable. We must continue that tradition and our Substantive Law Committees will be crucial to that effort.

I want to encourage all MDC members to take responsibility for growing the organization's membership. As a result of the changes in the profession over the past five or six years, membership in many bar organizations has fallen. While MDC's numbers remain strong, economic pressures on our member firms will force many of them to take a hard look at organizations like ours. I strongly urge you to encourage your firms not to cut back support for MDC.

I will close by saying that I am truly humbled by the opportunity to serve MDC along with the other Executive Committee members Mike Dailey, Nikki Nesbitt, Marisa Trasatti, Immediate-Past Chair Mary Dimaio, and Executive Director Kathleen Shemer. We all are committed to advancing MDC's goals and objectives and to making sure its star continues to shine brightly.

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Featured Articles

Columns

Insurance Coverage for Government Investigations: What Constitutes a "Claim?"

Joseph L. Beavers and Lee Crofton Douthitt

Government investigations directed at private business entities are becoming increasingly common in a variety of industries—from FDIC investigations in the banking industry to FDA investigations in the pharmaceutical industry.[1] Such investigations, whether initiated by state or federal regulatory bodies, are often very costly.[2] Targeted entities typically retain outside counsel and incur substantial costs locating and producing documents and electronically-stored information.[3] Fortunately, many businesses have (or can purchase) directors' and officers' ("D&O") or other liability insurance policies that potentially cover some of these costs.[4] Accordingly, once a target letter, subpoena, or other investigatory notice is received, the targeted company should review its insurance coverage to determine whether a claim should be made under its policy(ies).[5]

The scope of coverage under D&O policies varies significantly from policy to policy, and whether a government investigation is covered often depends on whether, as a threshold matter, the investigation constitutes a "claim" as that term is defined in a given policy.[6] This issue has been considered in a number of jurisdictions, including the United States District Court for the District of Maryland, and the analysis is always heavily fact-dependent.[7] As set forth below, however, policyholders have recently been successful in securing coverage for a variety of different investigations.[8] Targeted entities should always conduct a detailed analysis of their D&O and other potentially applicable policies when faced with any costs arising from a government investigation.[9]

Types and Methods of Investigations that May Trigger D&O Policy Coverage

While the recent financial crisis has certainly triggered an increase in government investigations into corporate wrongdoing, these types of government investigations have taken place for some time now. Perhaps more obvious at the federal level, the Security Exchange Commission (SEC), the Federal Bureau of Investigation (FBI), the Federal Trade Commission (FTC), the Federal Deposit Insurance Corporation (FDIC), and the Department of Justice (DOJ) all have the capacity to investigate private entities.[10] These government investigators could look into practices ranging from compliance with corporate lending laws, to possible antitrust violations, to government contract performance.[11]

For example, the SEC formed a working group in 2007 to investigate whether companies involved in subprime lending violated federal securities laws for failing to disclose information to investors.[12] The DOJ has closely monitored government contract bidding and compliance in the wake of the recession and a decreased military presence in Iraq and Afghanistan, leading to an increased number of companies banned from contracting with the government in recent years.[13] Notably, BP was recently banned from doing business with the United States over its "lack of business integrity" in the 2010 Deepwater Horizon oil spill.[14]

Possibly less anticipated are investigations led by state governments or agencies, such as states' attorney's general offices or consumer protection divisions.[15] These investigations may look to determine whether there have been violations of similar state corporate disclosure or contract compliance requirements.[16]

Regardless of whether the government investigation begins at the federal or state level, the investigation may initially take many forms. It could begin with a target letter, indicating the government's intent to

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[1] Caitlin P. Holt, *Subprime and Credit Crisis Investigations: What Constitutes a Claim for the Purposes of Professional Liability Insurance?*, 18 Conn. Ins. L.J. 585, 585 (2012).

[2] Mark M. Bell & Richard W. Westling, *Directors' and Officers' Insurance and Its Role in Government Investigations, New Appleman on Insurance: Current Critical Issues in Insurance Law*, Spring 2013, at 43-44.

[3] *See id.*

[4] Holt, *supra* note 1, at 585.

[5] Joseph D. Jean & Rachel M. Wrightson, *Ensuring Coverages for Actions in Response to Investigations*, N.Y.J.L., July 9, 2009.

[6] Richard A. Kirby & Gregory S. Wright, *Insurance Coverage for SEC Investigations*, Coverage, November/December 2010, at 19.

[7] *See ACE Am. Ins. Co. v. Ascend One Corp.*, 570 F.Supp.2d 789 (D. Md. 2008) (determining whether insured covered for costs responding to state consumer protection investigations under E&O policy).

[8] *Id.*; *MBIA Inc. v. Federal Ins. Co.*, No. 08 Civ. 4313, 2009 U.S. Dist. LEXIS 124335 (S.D.N.Y. Dec. 30, 2009).

[9] Jean & Wrightson, *supra* note 5.

[10] Nancy D. Adams & Kristen S. Scammon, *Navigating a Mine Field: Governmental Investigations, Cooperation, and D&O Insurance*, 2012-JAN Bus. L. Today (2012).

[11] *See id.*

[12] Holt, *supra* note 1, at 586.

[13] Dietrich Knauth, *Debate Rages over Suspension of Contractor Affiliates*, Law360, May 22, 2013, www.law360.com/governmentcontracts/articles/443573/debate-rages-over-suspension-of-contractor-affiliates.

[14] Timothy Rampton and Roberta Rampton, *U.S. Bans BP from New Government Contracts after Oil Spill Deal*, Reuters, Nov. 28, 2012, www.reuters.com/article/2012/11/28/us-bp-contracts-idUSBRE8AR0M120121128.

[15] Holt, *supra* note 1, at 588.

[16] Kenneth M. Breen & Thomas R. Fallati, *Subprime Lending Meltdown — Part Three: Federal and State Investigations, Stay Current* (Paul Hastings LLP, New York, N.Y.), July 2007 at 1, available at www.paulhastings.com/assets/publications/742.pdf.

(INSURANCE COVERAGE) *Continued from page 5*

pursue an investigation of the company, or a subpoena for records or testimony.[17] In fact, the government could serve these subpoenas on companies which are not the target of the government's investigation but whose responses may be helpful to the investigation.[18] As a result, a non-targeted company could be forced to incur significant costs to comply with a government investigation of a targeted company.

As these investigations progress, they may take the form of formal investigations, grand jury indictments, lawsuits, and/or fines.[19] While more formal investigations are more likely covered by a D&O policy, coverage often depends upon the facts and circumstances regarding the investigation and the specific language of the policy.[20] The critical question is almost always whether the investigation falls within the D&O policy's definition of "claim," which may be broadly or narrowly defined depending on the specific policy.

Potential D&O Coverage for Government Investigations

In the 1980s and 1990s, very few D&O policies defined the term "claim."[21] While this is no longer the case, should a D&O policy not define the term "claim," courts have held the term has no specific meaning within the insurance industry and, thus, is to be interpreted according to its plain meaning.[22] According to the Merriam-Webster Dictionary, a "claim" is "a demand for something due or believed to be due."[23] Meanwhile, Black's Law Dictionary defines a "claim" as "(1) the aggregate of operative facts giving rise to a right enforceable by a court; (2) the assertion of an existing right; any right to payment or to an equitable remedy, even if contingent or provisional; (3) a demand for money, property, or a legal remedy to which one asserts a right."[24]

Though courts are increasingly confronted with the task of interpreting D&O policies that define the term "claim,"[25] not all policies define the term consistently.[26]

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[17] Bell & Westling, *supra* note 2, at 51-52.
[18] *See ACE Am.*, *supra* note 7, at 795-97
[19] *See* Holt, *supra* note 1, at 586-88.
[20] *See id.* at 592-94.
[21] *See id.* at 592.
[22] *Cent. Ill. Pub. Serv. Co. v. Am. Empire Surplus Lines Ins. Co.*, 642 N.E.2d 723 (Ill. App. Ct. 1994).
[23] Merriam-Webster Collegiate Dictionary 227 (11th ed. 2011).
[24] Black's Law Dictionary 281-82 (9th ed. 2009).
[25] Holt, *supra* note 1, at 593.
[26] Patricia Bronte, *D&O Coverage for Corporate Criminal Investigations*, 7 No. 11 Ins. Coverage L. Bull. 3 (2008)

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 Joe L. Beavers and Lee C. Douthitt of Miles & Stockbridge P.C., provides insight into the scope of insurance coverage for government investigations directed at private business entities. An article by Angela W. Russell and Peter W. Chin of Wilson, Elser, Moskowitz, Edelman & Dicker, LLP discusses expert testimony in Maryland following the Court of Special Appeals' holding in *Montgomery Mutual Insurance Company v. Chesson*, 206 Md. App. 569, 51 A.3d 18 (2012). Charles B. Peoples of Thomas, Thomas & Hafer LLP provides an overview of *Cabrera, et al. v. Western Express, et al.*, 2012 U.S. Dist. LEXIS 132241 (D. Md. Sept. 14, 2012), *aff'd* by 2013 U.S. App. LEXIS 8971 (4th Cir. May 2, 2013), in which a Maryland federal court held there is no presumption of negligence in a rear end car accident case when both vehicles are moving at impact. Finally, Angela W. Russell, Maryan Alexander, and Lauren Marks of Wilson, Elser, Moskowitz, Edelman, & Dicker LLP write about the future of fault allocation 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 **Crab Feast**. Mark your calendars now for the Maryland Defense Counsel's **Past Presidents Reception**, which will take place on October 3, 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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Please Welcome MDC's New Members

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Given that government investigations can take many forms and that the term "claim" is not given a uniform definition, the question of whether the costs of responding to an investigation are covered is a concern to companies.[27] Thus, the analyses conducted by courts interpreting D&O policies are instructive with respect to how courts deal with these issues and how companies can best prepare for coverage disputes.[28]

Recently, in *MBIA Inc. v. Federal Ins. Co.*, the Second Circuit decided a major D&O policy coverage case.[29] In connection with several of its financial products, financial guarantees, and other structured financial obligations, MBIA came under investigation by the SEC and the New York Attorney General (hereinafter, "NYAG").[30] The investigation began in March 2001 when the SEC issued an order directing some MBIA officers to provide testimony concerning insurance products. Formal subpoenas were not issued by the SEC or the NYAG until December of 2004. The SEC and the NYAG issued more subpoenas in 2005, before allowing MBIA to voluntarily comply with informal document requests. In August of 2005, the SEC and the NYAG informed MBIA that they would initiate formal proceedings against MBIA for securities-law violations. In October of 2007, MBIA executed an offer of settlement, which the SEC accepted in January of 2007. Around the same time, the NYAG settled its investigation.

The cost to respond to these investigations exceeded $23 million. MBIA sought reimbursement pursuant to its D&O policies for the costs associated with the subpoenas, the investigations, an independent consultant's investigation required under the settlements, and two derivative actions filed by MBIA's shareholders. MBIA's D&O policy provided coverage for "Securities Claims," which were defined as "a formal or informal administrative or regulatory proceeding or inquiry commenced by the filing of a notice of charges, formal or informal administrative or regulatory proceeding or inquiry commenced by the filing of a notice of charges, formal or informal investigative order or similar document." The insurers disputed whether subpoenas, informal requests, and derivative actions taken by individuals who were not "insureds" were included in the scope of coverage.

The district court held that the subpoenas triggered a claim under the policy, finding that a subpoena qualifies as a formal or informal investigation and, alternatively, the policy's use of the words "or similar document" included subpoenas where the policy did not define "or similar document." Additionally, the district court held that the informal investigations at issue were sufficiently related to other formal investigations as to fit within the range of coverage provided by the policy. Finally, the district court held that the defense of the derivative actions included the policyholder or, alternatively, the derivative actions included the special litigation committee composed "exclusively of members of [MBIA's] Board of Directors." In its only finding against the policyholder, the district court held that the costs associated with the independent consultant were not covered under the policy because MBIA did not notify the insurer of the independent consultant so as to give the insurer the opportunity to "effectively associate" with the policyholder in the settlement of the claim as required by the language of the policy.

The Second Circuit affirmed the conclusions of the district court that favored the policyholder, albeit through a different course of analysis in some instances.[31] In agreeing that a subpoena was a formal or informal investigative order, the Second Circuit rejected the view that a subpoena is only "a mere discovery device." Most importantly, the Second Circuit found that the expenses associated with the independent consultant were covered claims, reversing the district court, believing that MBIA had satisfied the "right to associate" clause of the policy by giving the insurer "a single invitation to associate with adequate information about the claim under consideration for settlement." Importantly, an insured need not "return to the nonparticipating insurer each time negotiations about the same claim" take a different course. In finding coverage for each of MBIA's claims under the D&O policy, the analyses of the Second Circuit and the district court are instructive in determining how courts may view these cases in the future to reach a pro-policyholder result.

The United States District Court for the District of Maryland has also reached a pro-policyholder result in interpreting a similar definition of "claim." In *ACE American Insurance Co. v. Ascend One Corp.*, the court found that a subpoena and investigative demand for documents constituted a claim to trigger coverage.[32] The court based its decision on the rationale that the subpoena and investigative demand for documents fit within the policy's definition of claim as "a civil, administrative, or regulatory investigation commenced by the filing of a notice of charges, investigative order or similar document." In this case, the court looked beyond the four corners of the policy and found that extrinsic evidence, such as the caption of the subpoena, demonstrated the purpose of the subpoena and investigative demand was the investigation of potential violations of the Maryland Consumer Protection Act. The court reasoned that the caption evidenced a form of notice of charges so as to fall within the policy's definition of claim. In view of this, the court found that the subpoena triggered coverage under the policy. Both *MBIA* and *ACE Am.* show courts finding that the cost of responding to investigative demands, such as subpoenas, or informal investigations may be covered under a policy's definition of claim where those demands or investigations are made pursuant to more clearly-covered investigations that fall within the policy's definition of the term "claim."[33]

Also important to courts' decisions when interpreting D&O policies is the type of relief sought by the government investigation. In *Minuteman International, Inc. v. Great American Insurance, Co.*, for example, the court found that an SEC investigation was a claim to trigger D&O coverage based on a broader interpretation of the term "relief."[34] The court disagreed with the insurer's position that relief must take the form of monetary damages, injunctive-type sanctions, or criminal charges; holding that the relief sought by the subpoena was the production of documents or testimony. That the subpoena was a demand for something due satisfied the court that the subpoena sought a form of "relief."

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[27] Bell & Westling, *supra note* 2, at 53.
[28] *Id.*
[29] *MBIA Inc. v. Federal Ins. Co.*, 652 F.3d 152 (2d Cir. 2011).
[30] *MBIA Inc.*, *supra* note 8.
[31] *MBIA Inc.*, *supra* note 29.
[32] *ACE Am.*, *supra* note 7.
[33] *MBIA Inc.*, *supra* note 29; *ACE Am.*, *supra* note 7.
[34] *Minuteman Int'l, Inc. v. Great Am. Ins. Co.*, 2004 U.S. Dist. LEXIS 23876 (N.D. 2004).

(INSURANCE COVERAGE) *Continued from page 9*

Meanwhile, in *Foster v. Summit Medical Systems, Inc.*, the Minnesota Court of Appeals found that an SEC investigation was not a claim to trigger D&O coverage because it did not subject the directors, officers, or company to a binding adjudication or relief.[35] The policy defined a claim as "any judicial or administrative proceeding initiated against any of the Directors that may be subjected to a binding adjudication of liability for damages or other relief." The court determined that a general SEC subpoena did not fit within either the ordinary or legal meaning of the term relief and, thus, held that the insurer did not have a duty to defend the insured in the SEC investigation based on the insured's D&O policy.

Conclusion

It is important to realize that the costs of compliance with even seemingly informal or preliminary steps in a government investigation may be covered by a D&O or other liability policy. If such a situation arises, counsel should recommend that the policyholder seek defense from the insurer or reimbursement for compliance costs. Whether coverage exists will be always depend on the specific facts at issue and the language of the implicated policy. As illustrated in the cases discussed above, however, policyholders are often able to make a variety of arguments in support of coverage for government investigations.

Joe Beavers is a Principal in Miles & Stockbridge's Washington, D.C. and Baltimore offices. His practice focuses on the representation of policyholders in insurance coverage disputes. He is also a leader of the Firm's eDiscovery team and counsels firm clients regarding the management and discovery of electronically-stored information.

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[35] *Foster v. Summit Medical Systems, Inc.*, 601 N.W.2d 350 (Minn. Ct. App. 2000).

Expert Testimony in Maryland — Maintaining the *Frye-Reed* Standard: Unanimity Not Required for Exclusion, as the Existence of a Genuine Controversy is Enough

Angela W. Russell and Peter W. Chin

In a unanimous decision, the Court of Special Appeals reversed a trial court's determination that an expert's theories and methodologies used to establish a causal link between mold exposure and human health effects were admissible, finding instead that under the *Frye-Reed* analysis there was genuine controversy in the scientific community regarding the expert's diagnosis methods and theories. *Montgomery Mutual Insurance Company. v. Chesson*, 206 Md. App. 569, 51 A.3d 18 (2012) ("*Chesson III*"). In doing so, the Court of Special Appeals reiterated the doctrine followed in Maryland that was first adopted in *Reed v. State*: "if a new scientific technique's validity is in controversy in the relevant scientific community, or if it is generally regarded as an experimental technique, then expert testimony based upon its validity cannot be admitted into evidence." 283 Md. 374, 381, 391 A.2d 364, 368 (1978). This case marks the continued departure from the more lenient Daubert standard that is followed in federal courts and **in** the vast majority of state courts.

Expert testimony challenged: Factual and procedural background of *Montgomery Mut. Ins. Co. v. Chesson*, 206 Md. App. 569 (2012) (*Chesson III*)

In late 2002, after a group of employees of the Baltimore Washington Conference of the United Methodist Church ("BWCUMC") complained of a malodor emanating from the walls of the church, two types of mold were discovered. The employees filed Workers' Compensation claims, alleging that they had sustained an accidental injury or occupational disease known as "sick building syndrome" as a result of mold exposure. Workers' Compensation claims by two of the employees were denied, and they appealed to the Circuit Court of Howard County.

Prior to trial, the trial court denied BWCUMC's motion *in limine* seeking to exclude the testimony of Ritchie Shoemaker, M.D., the physician who had examined each employee and concluded that sick building syndrome had caused their injuries, and held that a *Frye-Reed* hearing was unnecessary. BWCUMC had argued that Dr. Shoemaker's theories and methodologies for diagnosis regarding a causal connection between mold exposure and certain human health effects had not been generally accepted within the relevant scientific community. The trial court reasoned that Dr. Shoemaker's testimony was not the proper subject of a *Frye-Reed* hearing, but was a medical opinion, which was not subject to *Frye-Reed*, and thus was admissible.

The trial proceeded and the jury returned verdicts in favor of each plaintiff, finding a causal relationship between mold exposure and certain illnesses claimed by plaintiffs. The Court of Special Appeals upheld the Circuit Court's ruling, holding that the lower court correctly declined to conduct a *Frye-Reed* hearing, specifically noting that "expert opinions concerning the cause or origin of an individual's condition are not subject to *Frye-Reed* analysis." *Montgomery Mut. Ins. Co.*

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v. Chesson, 170 Md. App. 551, 569, 907 A.2d 873, 884 (2006) ("*Chesson I*").

The Court of Appeals reversed, holding that a *Frye-Reed* hearing should have been held "to determine *whether the medical community generally accepts the theory* that mold exposure causes the illnesses that [the employees] claimed to have suffered, and the propriety of the tests Dr. Shoemaker employed to reach his medical conclusions." *Montgomery Mut. Ins. Co. v. Chesson*, 399 Md. 314, 328, 923 A.2d 939, 947 (2007) ("*Chesson II*") (emphasis added). The Court of Appeals explained that Dr. Shoemaker's medical tests were not so widely accepted as to be subject to judicial notice of reliability and thus, his causation theories and diagnostic testing methodologies were indeed subject to *Frye-Reed* analysis. *Id.* at 329, 923 A.2d at 947. On remand, the trial court conducted a *Frye-Reed* hearing where Dr. Shoemaker explained the development of his theories and methodologies. He described the various studies, diagnostic approaches, and treatments that he has explored — including the use of differential diagnosis — regarding illnesses associated with exposure to toxins. Dr. Shoemaker described the specific tests and methods he has developed to diagnose and treat patients with illnesses that he specifically attributes to exposure to water-damaged buildings, including a two-stage test involving establishing a patient's exposure and then observing certain test results that, according to Dr. Shoemaker, would confirm a causal link. The result of his process was to illustrate inflammation which, according to Dr. Shoemaker, is a biomarker for illnesses related to exposure to water-damaged buildings.

BWCUMC's expert, Hung Cheung, M.D., in turn presented an approach which considered four different criteria to evaluate patients with environmental exposure to mold. He explained that because there are different types of exposure, he would have to determine which one caused a patient's symptoms.

Dr. Cheung acknowledged that Dr. Shoemaker *could* impart a diagnosis using a differential diagnosis method, but that the issue of *causation* has "nothing to do with differential diagnosis." The differential diagnosis, according to Dr. Cheung, merely revealed the health effects being suffered. More importantly, Dr. Cheung further suggested the proposition that exposure to toxic mold by inhalation in water-damaged buildings causes certain health effects is not supported by the medical literature. Accordingly, Dr. Cheung opined that "Dr. Shoemaker's methodology, treatment, and opinion regarding causation are controversial and not generally accepted in the scientific community" — that is, they do not satisfy the *Frye-Reed* standard for admissibility. This case was then considered by the Court of Special Appeals of Maryland.

What the Court of Special Appeals said in *Chesson III*

The issues on appeal to the Court of Special Appeals, the second time, were whether Dr. Shoemaker's theories and methodologies were reliable and acceptable to establish general and specific causation and whether his differential diagnosis method was generally accepted in the medical community. The Court found that although under the *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993), standard — which eschews the requirement of a method's general acceptance in the scientific community — it would have determined that Dr. Shoemaker's theories regarding causation were reliable, under Maryland's *Frye-Reed* standard, however, Dr. Shoemaker's theories and methodologies were not generally accepted in the medical community, and thus, it determined that the Circuit Court erred in admitting his testimony.

The Court of Special Appeals reviewed *de novo* the experts' theories and methodologies.[1] It looked at the trial court's findings of fact and opinion where they accepted Dr. Shoemaker's diagnostic method as reliable to establish general and specific causation, specifically whether exposure to mold caused the employees' neurocognitive and musculoskeletal problems. The Court of Special Appeals noted that at the *Frye-Reed* hearing, Dr. Shoemaker pointed to two articles authored by other scientists that were published in scientific publications that supported his theory regarding "sick building syndrome." He also observed that two articles that he authored on the subject had been published in scientific journals as well.

Conversely, Dr. Cheung, BWCUMC's expert, presented an approach that he claimed could be used to determine what may be the cause of a patient's illness. He further observed that a differential diagnosis, such as the one described by Dr. Shoemaker, could be used to expose the health effects being experienced by a patient, but that "the scientific literature does not support the notion that exposure to toxic mold by inhalation in water damaged buildings causes certain human health effects." *Chesson III*, 206 Md. App. at 576, 51 A.3d at 23. The Court of Special Appeals also noted the myriad scholarly articles reflecting the notion that "demonstrate[s] that there is a genuine controversy within the scientific community with regard to whether exposure to water damaged buildings causes the human health effects Dr. Shoemaker suggests are caused by exposure to water damaged buildings." *Id.* at 607, 51 A.3d at 41.

Ultimately, the Court of Special Appeals, in reversing the trial court's decision to admit Dr. Shoemaker's testimony held that "because there are sources that support and oppose Dr. Shoemaker's theories and methodologies, and at least one that recognizes the relevant scientific field is undecided, we must conclude that Dr. Shoemaker's theories and methodologies with regard to exposure to water damaged buildings, and the human health effects suffered by appellees, are not generally accepted in the relevant scientific community." *Chesson III*, 206 Md. App. at 607, 51 A.3d at 41. The court reiterated the notion that its decision hinged on the distinction between the application of the *Daubert* standard and of the *Frye-Reed* standard. Namely, that *Daubert* — the standard adopted in federal courts and in the vast majority of states — does away with the latter's requirement that an expert's causation theories be generally accepted in the scientific or medical community. *Id.* The court has remained consistent in its reluctance to adopt this *Daubert* standard. This matter is, once again, before the Court of Appeals.

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[1] The Circuit Court issued its findings of fact fourteen months later, and its opinion on the matter of admissibility six months after that, noting in the latter "that the question of admissibility of expert medical testimony to prove general or specific causation appears to be a case of first impression in Maryland." *Id.* at 588, 51 A.3d at 30 (internal quotation marks omitted).

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(EXPERT TESTIMONY IN MARYLAND) *Continued from page 13*

What comes next — standards for expert testimony

If this decision is not reversed on appeal, the Court of Special Appeals has established its position on the admissibility of scientific theories and methods regarding causation of injury under Maryland's *Frye-Reed* standard for admitting expert witness testimony. The rule of law derived from this case is that while unanimity is not required to establish general acceptance of propounded scientific methods and tests — the existence of medical articles within the relevant scientific community that express contradictory perspectives on the validity of a method to determination causation can establish that a genuine controversy exists. Accordingly, a court may deny the admission of an expert's opinion when the scientific articles supporting the expert's position are controverted by scientific articles that oppose the conclusions of the former ones.

The result of this case firmly re-establishes that the passing of Maryland Rule of Evidence 5-702 did not abrogate the expert testimony admissibility standard established in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), and adopted in Maryland in *Reed.* More likely, this case more clearly marked the distinction between what is required to satisfy the *Frye-Reed* and *Daubert* standards. To reiterate, the Court of Appeals, in *Reed*, articulated its "general acceptance rule" as interpreted from *Frye*:

> On occasion, the validity and reliability of a scientific technique may be so broadly and generally accepted in the scientific community that a trial court may take judicial notice of its reliability. . . . Similarly, a trial court might take judicial notice of the invalidity or unreliability of procedures widely recognized in the scientific community as bogus or experimental. However, if the reliability of a particular technique cannot be judicially noticed, it is necessary that the reliability be demonstrated before testimony based on the technique can be introduced into evidence. Although this demonstration will normally include testimony by witnesses, a court can and should also take notice of law journal articles, articles from reliable sources that appear in scientific journals, and other publications which bear on the degree of acceptance by recognized experts that a particular process has achieved.
>
> ***
>
> That is to say, before a scientific opinion will be received as evidence at trial, the basis of that opinion must be shown to be generally accepted as reliable within the expert's particular scientific field. Thus, according to the Frye standard, if a new scientific technique's validity is in controversy in the relevant scientific community, or if it is generally regarded as an experimental technique, then expert testimony based upon its validity cannot be admitted into evidence.

Reed, 283 Md. at 380–81, 391 A.2d at 367–68 (citing *Frye*, 293 F. at 1014).

In *Chesson III*, the Court of Special Appeals noted that where Dr. Shoemaker presented scientific literature to support his position that exposure to mold in homes caused certain health effects, it equally acknowledged Dr. Cheung's cited articles that debunked the association. Notably, the Court acknowledged further that Dr. Cheung proposed "in the alternative, that more research was necessary." *Chesson III*, 206 Md. App. at 603, 51 A.3d at 39. The Court here seems to have reiterated that even in close calls, where the testimony or evidence offered to challenge an expert's testimony is not fully conclusive on an issue, but rather may need "more research," a court should not admit the expert's testimony.

The decision in *Chesson III* should not be a sea change in the well-established law of evidence in Maryland as set forth in seminal cases such as Reed. Nevertheless, while it cannot be predicted how a trial court would exercise its discretion in a given case, in response to scientific or medical evidence proffered by plaintiffs, defendants can be expected to seek to admit rebuttal evidence that, at a minimum, will establish the notion that "more research [i]s necessary," if not effectively debunk the proffered theories. Trial courts may view *Chesson III* as a bright-line rule to deny admission of an expert's testimony based on the mere existence of scientific or medical literature stating an opposing proposition. The Court of Appeals will have the last word on the subject, however, given that it granted certiorari to review the Court of Special Appeals' decision, and will hear the appeal on June 11, 2013.

Angela Russell is the regional managing partner of Wilson Elser's Baltimore office.. She has significant trial experience and has tried cases across the state of Maryland., in the District of Columbia and Minnesota. Her practice encompasses the defense of professional liability matters, including medical malpractice and legal malpractice actions as well as claims against agents, brokers and other professionals. Angela also regularly handles catastrophic general casualty matters.

Peter W. Chin is an associate in the Baltimore office of Wilson Elser Moskowitz Edelman & Dicker LLP. His practice focuses on commercial and civil litigation with a concentration on medical malpractice, products liability and personal injury.

Fault Allocation in Maryland Remains Undisturbed

Angela W. Russell, Maryan Alexander, and Lauren Marks

Earlier this month, the Court of Appeals upheld the long-standing contributory negligence doctrine rather than abandoning it for some form of the comparative negligence doctrine.

Writing for the majority in James K. *Coleman v. Soccer Association of Columbia, et al.* (No. 9, September Term, 2012), Judge John C. Eldridge explains that, even though the Court has the authority to abrogate the contributory negligence doctrine, it is improper for the Court to change the negligence system in Maryland because it is contrary to legislative policy. Over the years, there have been several bills proposed to the legislature that are aimed at abolishing the contributory negligence doctrine, all of which have been rejected by the General Assembly. The Court of Appeals interprets the failure of those bills as suggestive of a legislative policy to retain the contributory negligence doctrine in Maryland. Even though the Court has authority to change the common law, the majority quotes Chief Judge Bell, who incidentally dissented in the *Coleman* opinion, to point out that the Court should not enter the public debate even when the issue involves a matter of common law. The Court held that the common law should not be disturbed if it is contrary to the public policy of the State set forth by the General Assembly.

Judge Harrell dissented and Chief Judge Bell joined in the dissent. The dissent argues that contributory negligence is antiquated and that the early justifications for the doctrine are no longer compatible with the values of modern-day society. When first adopted, the contributory negligence was justified as a means to protect newly developing industry against the possible windfalls awarded by juries to plaintiffs. According to the dissent, the protection of industry at the expense of injured plaintiffs is an out-dated justification that defies notions of fundamental fairness. Justice requires the allocation of liability amongst everyone at fault. The dissent points to the trend across the United States in abandoning the contributory negligence doctrine to support a change in Maryland. The dissent advocates for the adoption of pure comparative negligence to be applied prospectively in negligence actions only, and not to strict liability and intentional tort claims.

Both the contributory and comparative negligence doctrines address the apportionment of damages based on the allocation of fault amongst the parties. The allocation, however, varies significantly depending on which doctrine is applied. Contributory negligence, the doctrine which is currently applied in Maryland and in only four other states, including Alabama, North Carolina, Virginia, and the District of Columbia, is an affirmative defense rooted in common law that is available to any party in a wrongful death, personal injury, or property action. Under the contributory negligence doctrine, an injured party is precluded from recovering any damages from a negligent defendant if the injured party's actions are a contributing factor in causing the injury — even if the injured party is only 1% responsible for causing his or her own injuries.[1] The contributory negligence doctrine was first adopted by the Maryland Court of Appeals in *Irwin v. Sprigg*, an 1847 decision.[2] Several bills have been introduced in the Maryland General Assembly to repudiate the doctrine of contributory negligence and to replace it with a comparative negligence system, but all initiatives for this change have failed.

The more modern comparative negligence doctrine is followed in forty-six states. There are three types of comparative fault standards: pure comparative fault[3], modified comparative fault with a 50% bar, [4] and modified comparative fault with a 51% bar.[5] In a pure comparative negligence jurisdiction, a plaintiff's fault is compared to the defendant's degree of fault and the plaintiff's recovery is reduced proportionately based on his or her own degree of fault. For example, in a pure comparative negligence jurisdiction, if a jury finds that the plaintiff is 5% at fault and the defendant is 95% at fault, the plaintiff's recovery is reduced by 5% and the plaintiff will recover 95% of his or her damages from the defendant. In jurisdictions where the 50% bar rule is applied, the plaintiff will recover nothing if he or she is 50% or more at fault. In 51% bar rule jurisdictions, a plaintiff will recover only if he or she is found to be less than 51% at fault.

In April of 2011, the Standing Committee on Rules of Practice and Procedure, in response to a request for information and advice from the Chief Judge of the Maryland Court of Appeals, issued a report indicating that, to the extent that the contributory negligence doctrine is a common law doctrine, it can be changed by judicial decision, as has been done in several other States, but that it cannot be changed by the Court's judicial rulemaking ability. The Court's rulemaking powers pursuant to Article IV, §18(a) of the Maryland Constitution are limited to matters affecting practice and procedure in Maryland courts and judicial administration. The contributory and comparative negligence doctrines are matters of substantive law that exceed the Court's rulemaking powers. In April of 2012, a year after the Standing Committee issued its' report, the Court of Appeals granted *certiorari* in *James K. Coleman v. Soccer Association of Columbia, et al.* (No. 9, September Term, 2012), a case which resurfaced the heated debate over whether to change the negligence system in Maryland by ameliorating or repudiating the contributory negligence doctrine.

In that case, James Coleman, an assistant soccer coach, jumped up and grabbed the crossbar of an unanchored soccer goal,

Continued on page 19

[1] *See, Board of County Commissioners of Garrett County v. Bell Atlantic*, 346 Md. 160 (1997).

[2] 6 Gill 200 (1847).

[3] The pure comparative fault is recognized in the following thirteen states: Alaska, Arizona, California, Florida, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, New York, Rhode Island, South Dakota, and Washington.

[4] Twelve states apply the 50% bar rule, including Arkansas, Colorado, Georgia, Idaho, Kansas, Maine, Nebraska, North Dakota, Oklahoma, Tennessee, Utah, and West Virginia.

[5] The following twenty-one states recognizes the 51% bar rule: Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, Ohio, Oregon, Pennsylvania, South Carolina, Texas, Vermont, Wisconsin, and Wyoming.

(FAULT ALLOCATION) *Continued from page 17*

which caused the soccer goal to tip over onto Coleman's face and caused a facial fracture necessitating the installation of titanium plates. While being treated at the hospital, Coleman admitted that he had smoked marijuana on the day of the accident. A jury in the Circuit Court for Howard County found that the soccer association was negligent in failing to properly anchor the soccer goal, but that Coleman was barred from any recovery because he was contributorily negligent in causing his own injuries. In consideration of the potential broader implications of the *Coleman* decision, including its effect on the outcome of litigants claims and the potential larger scale economic implications on the region, the Court of Appeals reviewed briefs filed by both parties in the *Coleman* case, as well as "friend of the court" briefs from interested groups, such as the American Tort Reform Association, U.S. Chamber of Commerce, Coalition for Litigation Justice, Inc., American Insurance Association and the American Medical Association, to name a few.

Coleman, along with other proponents of changing the current contributory negligence standard, argued that the doctrine is unjust and antiquated. Coleman, in his appellate brief, cited legal scholar, Professor William L. Prosser, a critic of the contributory negligence, for his opinion that the contributory negligence doctrine allocates the entire loss onto the plaintiff, who is least able to bear it and who is often less at fault, while the defendant gets off unscathed. They argued that barring Coleman from recovering any damages leaves no incentive for the defendant to correct its own negligent conduct and leaves Coleman with no compensation for his medical bills. They further argued that the doctrine undermines the main purposes of the justice system — to deter negligent acts by assigning liability to those that performed those acts.[6]

Those who advocated for the preservation of the contributory negligence standard pointed out that abandoning the doctrine would upset other aspects of the State's tort law system, including the application of joint and several liability, the assumption of the risk doctrine, and contribution amongst tortfeasors. They argued that it is the General Assembly that should implement any changes to the State's negligence system, particularly where there have been no significant events that require any change. They further noted that all initiatives to bring about change to the current system have failed with the General Assembly, the people's representative, and that the judiciary should not interfere. They advised that changing to a comparative fault system would lead to (1) an increase in insurance premiums, including the cost of automobile insurance, general liability, and medical malpractice insurance costs; and (2) cause an increase in litigation and associated costs to individuals, businesses, and local governments, *i.e.* require the hiring of additional State personnel to handle the increased litigation in the courts.[7]

Whatever side of the debate you agree with, it is undeniable that changing the tort liability system is a massive undertaking that requires careful consideration of the implications on Maryland, its' citizens, small businesses, and the State's overall economic climate. To uproot the tort liability system that has been in place for over a century brings with it much uncertainty and could threaten Maryland's economic edge. A contributory negligence standard arguably helps Maryland maintain its economic and business competitiveness. Moving away from contributory negligence could increase litigation and its associated costs.

The Maryland Court of Appeals has determined that any change to the negligence system is best delegated to the legislature. It is the legislature that is best equipped, through its committees and public hearings, to study the effects of a tort liability system change, to gauge and factor public opinions on these issues, and to make necessary changes, if any. The judiciary has not been afforded with the far-reaching rule making powers necessary to effectuate the type of sweeping change to the tort liability system that a modification in the law on contributory negligence would bring. According to the research conducted by the Standing Committee, thirty-three States that have switched from contributory negligence to some type of comparative negligence system have done so by statute. Only twelve States have made the transition through judicial decision. If Maryland were to transition to a comparative fault system, several statutory provisions, *i.e.* joint and several liability and contribution amongst joint tortfeasors, would also need to be changed, along with many statutes that refer to or hinge on contributory negligence. The judiciary is simply unable to repeal or amend these statutes, hence, the Court has agreed that task is best left for the legislature to handle.

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In practice, the strict result of a contributory negligence defense—the chief complaint amongst those who oppose contributory negligence—is often tempered by the actions of juries. Despite evidence to support a finding of contributory negligence and a jury instruction on contributory negligence, juries are sometimes reluctant to allow the defendant to get off "scot free" and instead will award the plaintiff some reduced amount of damages to account for the plaintiff's degree of fault. In effect juries, in cases where they deem it appropriate, have been known to apply what is akin to a comparative negligence standard, despite being in a contributory negligence jurisdiction and irrespective of Maryland law. The injustice complained of by those who seek a change in Maryland's tort system simply is not always reality when a jury doles out justice.

With the court's recent decision some members of the legal community are pleased, while others remain dissatisfied. Although the contributory negligence debate has been put to rest for the time being, the direction of Maryland's tort liability system is regularly debated in the legal community, and the initiative to abrogate the contributory negligence doctrine may well resurface. It will be interesting to see whether Maryland's position on contributory negligence remains unchanged or whether it eventually becomes one of the growing number of states who have adopted some form of comparative fault. For now, contributory negligence remains a viable defense in Maryland.

Angela Russell is the regional managing partner of Wilson Elser's Baltimore office.. She has significant trial experience and has tried cases across the state of Maryland., in the District of Columbia and Minnesota. Her practice encompasses the defense of professional liability matters, including medical malpractice and legal malpractice actions as well as claims against agents, brokers and other professionals. Angela also regularly handles catastrophic general casualty matters.

Maryan Alexander is an Associate at Wilson Elser Moskowitz Edelman & Dicker LLP.

Lauren Marks is a Law Clerk at Wilson Elser Moskowitz Edelman & Dicker LLP.

[6] William L. Prosser, Comparative Negligence, 51 Mich. L. Rev. 465, 469 (1953).

[7] Testimony of State Treasurer Nancy K. Kopp before the Senate Jud. Proc. Comm., SB 267, 2007 Session (March 6, 2007).

2013 Negligence and Medical Liability Legislative Update

Richard R. Martell

The 2013 Session of the Maryland General Assembly saw the introduction of a number of bills involving general negligence and medical liability issues. Among the bills that were signed into law was a provision broadening the powers of the Maryland Board of Physicians, a law allowing pharmacists to administer a broad range of vaccines, and a law facilitating the use of telemedicine physicians by Maryland hospitals. Bills that failed to pass in this session included a proposed law recognizing and regulating naturopathic doctors, a standardized set of dog bite liability rules for dogs of all breeds, and a bill which would preemptively reverse any decision by the Court of Appeals striking down Maryland's common law contributory negligence rule. Below is a summary of some of the notable bills that were introduced.

Bills Signed Into Law

HB 1042/SB 798 — ***Credentialing and Privileging of Telemedicine Physicians*** — Allows hospitals that use telemedicine services to rely on the credentials and licensing held by the telemedicine physicians at the distant site where they are located.

HB 1296/SB 981 — ***Powers of the Board of Physicians*** — Expands the power of the Maryland Board of Physicians to issue cease and desist orders to physicians for any conduct that warrants discipline and poses a serious risk to patients. Previously, the Board could only issue cease and desist orders for practicing medicine without a license.

SB 401 — ***Pharmacists Administering Vaccines*** — Expands the range of vaccines pharmacists may administer to adults and children ages 11-18. Previously pharmacists could only administer a few select vaccines to adults and could only give the flu vaccine to children.

HB 1356/SB 512 — ***ID Badges for Health Care Practitioners*** — Requires most outpatient health care practitioners to wear ID badges indicating the practitioner's name and type of license.

Bills Passed by One Legislative House

HB 1310/SB 834 — ***Expanded Definition of "Health Care Provider"*** — Bill would change the legal definition of a "health care provider" for the purposes of the medical malpractice liability provisions under Cts. & Jud. Proc. § 3-2A-01 *et seq.* to include nurse practitioners, nurse midwives, nurse anesthetists, nurse psychologists, clinical nurse specialists, occupational therapists, and agents or employees of a health care provider who deliver health care services.

HB 67/SB 121 — ***Health Care Decisions Act*** — Bill would change the procedure for certifying that a patient is not capable of making informed health care decisions. The current procedure requires two physicians to certify the patient's incapacity. The bill would allow the certification to be made by two physicians or a physician and a psychologist.

HB 1290/SB 837 — ***Health Care Practitioner Disciplinary Procedures*** — Bill would alter procedures for disciplining health care practitioners by their respective health occupation boards by prohibiting stays of disciplinary orders pending judicial review and preventing challenges due to certain procedural defects.

Bills that Died in Committee

HB 1029/SB 783 — ***Naturopathic Doctors*** — Bill would recognize and regulate naturopathic doctors in Maryland, allowing them to practice naturopathic medicine, order tests and imaging studies and prescribe natural medications. Certain actions such as prescribing prescription drugs and performing most surgeries would be prohibited. Bill would also require the appointment of a naturopathic doctor to the Maryland Board of Physicians.

HB 618 — ***Dog Owner Liability*** — Bill would establish standard rules of liability for personal injuries caused by dog bites without regard to the breed or heritage of the dog.

HB 1265/SB 835 — ***Hospital Programs for Addressing Medical Errors*** — Bill would allow hospitals to establish Patient Safety Early Intervention Programs responsible for addressing, explaining, and apologizing for medical errors. These programs could also work to resolve any legal claims at an early stage. Statements made as part of an early intervention program would be inadmissible as an admission of liability or an admission against interest.

HB 1114/SB 836 — ***Periodic Payments of Personal Injury Judgments*** — Bill would require courts to order that payments of health care malpractice judgments of more than $1.5 million be made through annuities under certain circumstances.

HB 1156/SB 819 — ***Maryland Contributory Negligence Act*** — Bill would automatically reverse any Court of Appeals decision striking down Maryland's contributory negligence rule and restore the common law contributory negligence rule as it existed on January 1, 2011. (In *Coleman v. Columbia Soccer Association*, currently pending before the Maryland Court of Appeals, the appellant urged the court to discard Maryland's contributory negligence rule in favor of a comparative negligence scheme).

HB 1316/SB 771 — ***Medical Injury Post-judgment Interest*** — Bill would change the statutory post-judgment interest rate in medical injury cases to the Federal Reserve prime rate or 3%, whichever is greater. The current statutory rate is 10%.

SB 747 — ***Statutory Interpretation of the Term "Physician"*** — Where state statutes or regulations require the signature or approval of a physician, bill would include physician assistants and nurse practitioners in the term "physician."

HB 1151/SB 760 — ***Certified Nurse Midwives*** — Bill would allow certified nurse midwives to work without a collaboration agreement with a physician or other health care provider.

HB 810 — ***Mental Health Professionals — Duty to Report*** — Where a patient might pose a threat to himself or others, bill would allow health care providers to report this to state health officials who could then report to the police for the purposes of assessing the patient's eligibility to own a firearm and addressing any imminent threats. Bill would also immunize the decision to report or not report a patient.

Richard R. Martell is an associate in Cornblatt, Bennett, Penhallegon & Roberson's litigation practice group.

Maryland Federal Court Holds that there is No Presumption of Negligence in a Rear End Car Accident Case When Both Vehicles are Moving at Impact.

Charles B. Peoples

On May 2, 2013, the Fourth Circuit affirmed summary judgment entered in favor of the Defendants in a rear end car accident case by Magistrate Judge Stephanie Gallagher of Maryland's federal District Court.

The case, *Cabrera, et al. v. Western Express, et al.*, 2012 U.S. Dist. LEXIS 132241 (D. Md. Sept. 14, 2012), *aff'd* by 2013 U.S. App. LEXIS 8971 (4th Cir. May 2, 2013), arose out of an accident on Interstate 70 when a tractor trailer rear ended a car that merged in front of the tractor trailer. The Plaintiffs sued the tractor trailer driver and his employer. The driver failed to cooperate in discovery by attending his deposition or answering interrogatories. None of the four witnesses to the accident could testify about the actions of the tractor trailer or its driver before the impact. All of the witnesses merely saw the impact.

The Defendants moved for summary judgment, arguing that there was no evidence of negligence on their part, as no witness could testify about the actions of the tractor trailer prior to impact. Plaintiffs opposed summary judgment, arguing that there was a presumption of negligence in all rear end accident cases. The case hinged on the application and interpretation of two cases: *Andrade v. Housein*, 247 Md. App. 617, 810 A.2d 494 (2002) and *Brehm v. Lorenz*, 206 Md. 500, 112 A.2d 475, 479 (1955).

Plaintiffs relied on *Andrade*, where the plaintiff was rear ended when he was stopped at an intersection. *Id.* at 619. A witness testified "that she thought [the defendant] and [the plaintiff] were 'playing around' at the intersection." *Id.* The trial court granted a motion for judgment when there was no evidence presented of the defendant's conduct prior to the accident. *Id.* at 620. The Court of Special Appeals reversed the decision, concluding that

> a true evidentiary presumption of negligence arises where a motor vehicle is lawfully stopped on a highway awaiting for traffic to clear before entering an intersecting highway and that vehicle is suddenly struck from behind by another vehicle, resulting in personal injuries and property damage to the driver and the front vehicle.

Id. at 623 (emphasis added). The Court explained,

> [T]he [plaintiff] cited two sections of the Transportation Article, which [the defendant] allegedly violated: . . . following too closely and negligent driving. In the absence of some explanation by [the defendant], either section supports an inference or presumption of negligence.

Id. at 622.

The Defendants in *Cabrera* argued that *Andrade* was limited by its express language to situations where the front vehicle is rear ended while stopped at an intersection. In *Cabrera*, the Plaintiffs were rear ended while admittedly moving on the interstate.

The Defendants in *Cabrera* relied on *Brehm v. Lorenz*, 206 Md. 500, 112 A.2d 475, 479 (1955). In *Brehm*, the front car in a rear end accident stopped unexpectedly and suddenly when a cat darted in front of the car. The defendant hit the car from behind. The trial court directed a verdict in favor of the defendant at the close of the plaintiff's case because the plaintiff failed to present evidence of negligence on the part of the defendant. Maryland's Court of Appeals upheld this ruling, explaining that the plaintiff

> failed to produce any evidence whatsoever of any specific act of negligence on the part of defendant. There was no evidence that he failed to keep a proper lookout, and no evidence that he did not have his car under proper control. There was also no evidence that he was driving too near [plaintiff]'s car. In fact, [plaintiff] admitted on the stand that he did not know that any car was coming behind him. It is common knowledge that a driver can usually see in his mirror the reflection of the headlights of a car coming close behind him. But [plaintiff] admitted that, although the weather was clear on the night of the accident, he did not see any reflection from the lights of defendant's car. There was also no evidence that defendant was driving at an excessive rate of speed before it bumped into [plaintiff]'s car.

Id. at 506-07.

In upholding the trial court's ruling, the *Brehm* Court recognized the "general rule that negligence is not presumed from the mere happening of a motor vehicle collision, because it cannot be inferred in the absence of negligence that one party rather than the other was at fault." *Id.* at 508. The Court went on to state, "We specifically hold that the mere happening of a rear-end collision of two motor vehicles, without evidence of the circumstances under which it happened, is not proof of negligence of either driver." *Id.*

In summary, there was a spectrum of authority. On one end was *Andrade* setting forth a presumption of negligence in rear end accident cases. On the other end was *Brehm*, stating that negligence cannot be presumed from the mere happening of a motor vehicle accident. The issue was on which end of the spectrum did the *Cabrera* case fall?

In an unpublished opinion, Magistrate Judge Gallagher, of Maryland's federal District Court, sided with the Defendants and held, "where both vehicles were moving at the time of the collision, no such inference of negligence can be drawn simply because the collision involved the front of one vehicle and the rear of another. The accident could have been caused by negligence on the part of either driver, or it could have occurred even though neither driver was negligent. This case falls within [the] province of *Brehm*." Thus, the Court granted summary judgment to the Defendants because there was no evidence of negligence on their part, as there was no evidence of their actions prior to impact. The Fourth Circuit affirmed on May 2, 2013, but did not publish an opinion.

In so holding, Judge Gallagher accepted the Defendants' reasoning that, when a vehicle is rear ended while lawfully stopped at an intersection, it is far more likely that

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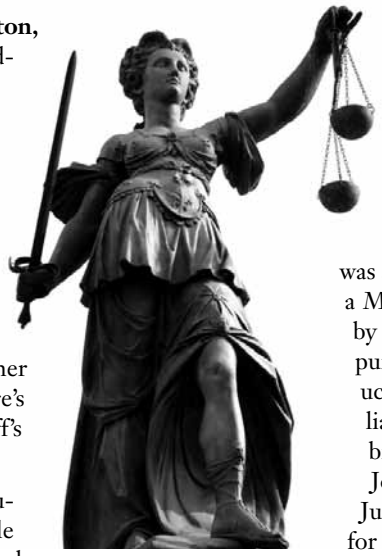
Spotlights

Wilson Elser Obtains Dismissal of Case of First Impression under Medicare as Secondary Payer Act



Robert W. Goodson of **Wilson Elser's Washington, D.C. office**, representing three health care providers, recently won a motion to dismiss a case brought in the U.S. District Court for the District of Maryland under 42 U.S.C. § 1395y (b)(3)(A). This statute contains a private cause of action for double damages when a primary plan "fails to provide for primary payment (or appropriate reimbursement)" in accordance with Medicare as a Secondary Payer.

Plaintiff obtained a jury verdict in a medical malpractice case and judgment was entered in her favor before the Circuit Court for Prince George's County. Medicare currently has a lien on Plaintiff's judgment.

Defendants have appealed and taken every precaution to stay the enforcement of the judgment while the appeal is pending by filing an Affidavit executed by their insurer pursuant to Maryland Rule 8-424. During the pendency of the appeal, Plaintiff filed a complaint in federal court, using the Medicare as Secondary Payer Act to argue that she was entitled to damages in twice the amount of the Medicare lien. At oral argument on the Defendants' motion to dismiss, Mr. Goodson argued that Plaintiff's claim was not ripe because the judgment could not be enforced while the appeal was pending.

Judge Titus agreed and dismissed the case on March 20, 2013. This is an important decision in light of recent promotion by plaintiffs' attorneys in the Washington/Baltimore area that the private cause of action permits double recovery when a judgment is entered against a health care provider or tortfeasor. In a lengthy oral opinion, Judge Titus reasoned that Plaintiff's claim was premature as she would not be able to enforce the state court judgment while appeal was pending in the Court of Special Appeals. He also opined that the circumstances of the case did not fall within the statute because Defendants did not "fail to pay" Medicare.

Robert Brittingham, et ux. v. Elliott's Hardware, Inc., Baltimore City Circuit Court, Asbestos Litigation, Case No. 24x12000852.

Robert E. Scott, Jr., **Eric M. Leppo**, and **Semmes, Bowen & Semmes** obtained summary judgment on behalf of an Ocean City, Maryland retail hardware store in a mesothelioma case. The Brittingham matter was given an expedited trial date in the April 2013 *Burke* Trial Group as a living mesothelioma Plaintiff but was severed from the trial group when the court granted a Motion to Change Venue to Worcester County filed by various Defendants. The Plaintiff alleged that he purchased asbestos-containing joint compound products from the store, and sought to hold the company liable under claims of strict liability, negligence and breach of warranty. On April 18, 2013, the Honorable John Glynn granted the store's Motion for Summary Judgment relying upon his summary judgment ruling for 84 Lumber in a prior case (*Neophytos Kacoyianni v. John Crane-Houdaille Inc et al*, Case No. 24x10000430) applying Maryland's statute of repose. Defendant's Motion for Summary Judgment was also premised upon Maryland's sealed container defense in light of the store's role as solely a retail product seller that did not alter or modify the product or its warnings in any way.

Jury Awards Brethren Mutual $500,000 for Fire Caused by Manufacturing Defect

In January of 2010 a fire destroyed a waterfront home in Chesapeake City, Maryland. Assisted by fire investigator Charles Hughes and electrical engineer Robert Simpson, Brethren Mutual, which insured the property, concluded that the transmitter of a wireless pet containment system manufactured by PetSafe was the cause of the fire. On June 14, 2012, after a four day trial in the United States District Court in Baltimore, a jury agreed, finding that a manufacturing defect in the circuit board of the transmitter was the cause of

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(REAR END CAR ACCIDENT CASE) *Continued from page 23*

the striking vehicle was negligent than when a vehicle is rear ended while traveling down the interstate, especially where the defendant offers no alternative explanation (i.e., the struck vehicle did not have functioning brake lights, or backed up into the striking vehicle, etc.). Certainly, in contrast, there are more reasonable explanations for a rear end accident when both vehicles are moving that can be attributed to the leading or front vehicle, such as, most prominently, a sudden stop by the struck vehicle operator or where that driver suddenly and without warning cuts off the striking vehicle. In summary, the Court accepted the Defendants' reasoning that what justified awarding the plaintiff the presumption of negligence when a car is rear ended while stopped at an intersection (as in *Andrade*), was not present in a case where a car is rear ended while moving on the interstate (as in *Cabrera*) because there are far too many variables and questions under the circumstances as to negligence to automatically permit a presumption of negligence. Consequently, according to Judge Gallagher's opinion in *Cabrera*, there is no presumption of negligence in a rear end accident case where both cars are moving at the time of impact, and a plaintiff must present evidence of negligence to defeat summary judgment in such a case.

Ben Peoples is a partner in the Baltimore office of Thomas, Thomas & Hafer, LLP.

(SPOTLIGHTS) *Continued from page 25*

the fire. The jury awarded Brethren Mutual $500,000 in damages.

The **Niles, Barton & Wilmer** team consisting of Chairman of the Litigation Department **George E. Reede, Jr.**, along with Associate **Mark Talty** and Paralegal **Christine Boessel**, who represented Brethren Mutual at trial.

The **Waranch & Brown, LLC**, team of **Neal M. Brown** and **Christina N. Billiet** successfully defended Greater Baltimore Medical Center in a wrongful death case filed by Cardaro & Peek, LLC. The case was tried for six days in the Circuit Court for Baltimore County before Judge Michael Finifter. The jury returned a defense verdict on April 24, 2013.

Frank Walchuck, 69 years old, presented to GBMC on March 29, 2011, complaining of two days intermittent chest pain. The triggering episode for his chest pain involved an unusual amount of heavy exertion. Mr. Walchuck was admitted for cardiac monitoring and a stress test was scheduled for the next day. Early on the morning following admission, Mr. Walchuck began complaining of back and chest pain, and suddenly coded. GBMC health care providers were unable to resuscitate him.

Plaintiffs alleged that Mr. Walchuck died as a result of a failure to diagnose unstable angina and corresponding failure to fully anticoagulate with heparin.

GBMC responded that Mr. Walchuck was admitted to rule out possible acute coronary syndrome, but that a diagnosis of unstable angina could not have been made prior to his death. Under those circumstances, full anti-coagulation on heparin was not indicated.

The jury found GBMC not liable for Mr. Walchuck's death.

Laura Steinbach v. Giant Food LLC, Unreported decision, Before the Court of Special Appeals, No 2203, September Term, 2011

Kevin O'Neill, a Member of **Schmidt, Dailey, & O'Neill, L.L.C.** in Baltimore successfully argued before the Court of Special Appeals, the panel was comprised of Judge Zarnoch, Judge Wright and Judge Moylan. Claimant Laura Steinbach filed a workers' compensation claim alleging she suffered from cervical degenerative disc disease arising from repetitive trauma in the course of her employment with Giant Food LLC as a cashier. She filed the claim as an Occupational Disease, but amended it to be an accidental injury at the hearing before the Commission, all while acknowledging that there was no specific incident or "accident". The claim was disallowed by the Commission, and Claimant Steinbach filed an appeal to the Circuit Court for Prince George's County. A jury reversed the Commission's decision and found that she had sustained an accidental injury arising out of and in the course of her employment. Mr. O'Neill on behalf of Giant Food and its Insurer filed a JNOV Motion alleging that the jury's verdict was an error of law, and the Judge Leo Greene of the Circuit Court for Prince George's County granted the motion and set aside the jury verdict. Claimant Steinbach appealed to the Court of Special Appeals arguing that the case of *Harris v Howard County Board of Education*, 375 Md. 21, 825 A.2d 365 (2003) opened the door for repetitive trauma claims to be accidental injuries now that there is no unusual activity requirement and relied on *Foble v. Knefely* among others to argue that repetitive trauma claims can now be accidental injuries.

The Court of Special Appeals disagreed with the Claimant's arguments, and affirmed the Circuit Court Judge's decision to grant the JNOV in favor of the Employer/ Insurer. The Court stated that *Harris* did not eliminate the need for the injury to be accidental in nature in order for it to be found compensable. The Court explained that *Harris* simply lessened the focus upon the activity leading to the injury (no need for it to be unusual) but the requirement that the injury be accidental continues in force per this Court's analysis. The Court relied upon Judge Zarnoch's opinion in *Pro-Football v. Tupa*, 197 Md.App. 463, 14 A.3d 678 (2011), aff'd, 428 Md. 198, 51 A.3d 544 (2012), in which he wrote that for the injury to be accidental it must happen by chance and without design, and take place unexpectedly and unintentionally. Ms. Harris had in fact had an accident when she heard the crack in her back and screamed. There was no dispute that no such event took place in the instant case. They also acknowledged that there is already a separate category for repetitive trauma claims or those that may not qualify as "accidental" in the form of occupational diseases but that did not apply to the facts before the Court in this case.

Claimant filed a Petition for Cert that was denied.

Analyzing the Necessity of Expert Testimony With Respect to "Substantial Factor" Causation in Lead Paint Actions: *Ross v. Housing Auth. of Baltimore City*

The Maryland Court of Appeals, as a matter of first impression, took up the issue of "substantial factor" causation in a lead paint poisoning action and considered whether expert testimony was necessary in order to establish that a particular property was a "source" of a child plaintiff's elevated blood lead levels. In *Ross v. Housing Auth. of Baltimore City*, 63 A.3d 1 (Md. 2013), the Court of Appeals held that the Circuit Court did not abuse its discretion in excluding the plaintiff's causation expert, but that summary judgment, solely based upon that exclusion, was inappropriate.

Facts and Procedural History

The plaintiff, Cherie Ross, was born on October 6, 1990. From birth through 1992, Ms. Ross lived at 934 N. Gilmor Street, owned by Bernard Dackman. She then moved to 546 N. Payson Street, owned by the Housing Authority of Baltimore City ("HABC"), and resided there from June 1992 through 1996. Ms. Ross sued Mr. Dackman and HABC alleging that she sustained injuries resulting from exposure to lead paint at both properties during the respective tenancies. Mr. Dackman settled with Ms. Ross shortly before trial.

Before trial, the Circuit Court granted HABC's motion in limine to exclude a portion of Dr. Jacalyn Blackwell-White's testimony concerning the source of Ms. Ross' alleged lead exposure. The court then granted HABC's oral motion for summary judgment on the basis that Ms. Ross could not prove causation without expert testimony.

The Court of Special Appeals, in an unreported opinion, affirmed

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the Circuit Court's exclusion of Dr. Blackwell-White but did not consider whether summary judgment was appropriate because Ms. Ross failed to separately challenge that ruling. The Court of Appeals granted certiorari to consider both issues: (1) whether the Circuit Court abused its discretion in excluding Dr. Blackwell-White, and (2) whether the Circuit Court erred as a matter of law in granting summary judgment based on the absence of a causation expert.

The Court's Reasoning

With respect to the exclusion of Dr. Blackwell-White, the Court of Appeals held that the Circuit Court did not abuse its discretion in finding that she lacked the qualifications to provide expert testimony as to the source of a child's lead exposure and that she lacked the necessary factual basis to identify the source of exposure. Specifically, the Court noted the undisputed evidence of various possible alternative causes of her elevated blood lead levels. Because Dr. Blackwell-White testified that she was simply identifying the "potential risk" of particular properties and could not provide any certainty with her opinions as to causation, the Court found that her conclusion as to "source" was likely to confuse the jury. Thus, the Circuit Court was within its discretion to exclude that "source" testimony.

However, this exclusion was not a "fatal blow" to Ms. Ross' case. The Court remanded the case back to the Circuit Court on the basis that the fact-finder could infer from the evidence that lead exposure at 546 N. Payson Street was a substantial contributing factor to her blood lead levels without the testimony of a causation expert. The evidence consists of inspection reports identifying lead on the property, testimony that Ms. Ross was exposed to paint dust and chips at the property, and medical records indicating that her blood lead levels rose during the first year they resided at 546 N. Payson Street.

Tydings & Rosenberg Prevails in Defense of ADA and Maryland's White Cane Law Claims

Tydings & Rosenberg attorneys, **William Carrier** and **Kelly Marzullo**, prevailed in a case brought by Blind Industries & Services of Maryland, Inc., and three individual plaintiffs, against Route 40 Paintball Park in the U.S. District Court for the District of Maryland. At issue were claims that the Paintball Park wrongfully denied access to the plaintiffs under the American Disabilities Act and Maryland's White Cane law.

The case presented novel issues in the recreational industry under the ADA and White Cane Law, including whether the plaintiffs could be denied access based on the park's customary rules and regulations, the appropriateness of the defendant's assessment and conclusion that the individual plaintiffs presented a direct threat to others, and whether and how the park's usual practices needed to be changed to accommodate the plaintiffs.

The case was tried before Judge William M. Nickerson in February 2013, and a decision was issued on March 21, 2013.

Robert C. Morgan and **Joseph S. Johnston** of **Morgan Carlo Downs & Everton, P.A.** (Hunt Valley) recently obtained a defense verdict in Circuit Court of Maryland for Frederick County for an oral and maxillofacial surgeon who allegedly failed to diagnose oral squamous cell cancer in a patient. The plaintiffs alleged that the failure to diagnose caused the patient's death. The plaintiff's decedent, a 43-year old male, presented to the defendant oral and maxillofacial surgeon with complaints of left-sided facial pain in September 2006. The defendant performed a thorough history and physical examination and ordered a panoramic x-ray and did not locate any lesion or other sign of disease upon intraoral examination. The plaintiff was told to return in one week with a pain diary but he did not return for a follow-up exam until more than 10 weeks later, in December 2006. Upon follow-up presentation in December 2006, the patient complained of left-sided facial pain and defendant again performed a thorough history and physical examination and did not locate any lesion or other sign of disease after looking inside the mouth. The defendant diagnosed the patient as having atypical facial pain with possible trigeminal neuralgia and referred the patient to a neurologist and the neurologist thereafter performed regular examinations on the patient, through March 2007. In May 2007, approximately five and a half months after the defendant's last examination of the patient, an otolaryngologist (ear, nose and throat surgeon) located a squamous cell oral cancer tumor in the lower left-side of the patient's oral cavity, in the base of tongue and retromolar trigone area.

The plaintiffs claimed that the defendant failed to diagnose the tumor during the follow-up examination in December 2006 and that oral cancer was causing the patient's facial pain, not trigeminal neuralgia, and that further tests such as an MRI scan would have detected the tumor. The defense successfully argued that the defendant complied with the standard of care in all respects during his follow-up examination of the patient and that the standard of care did not require an MRI scan or any other test. The defense also proved that the patient had an aggressive type of oral cancer that was not even present during the defendant's follow-up examination of the patient and did not become clinically detectable until shortly before the tumor was diagnosed by the otolaryngologist. The jury returned a defense verdict finding no breach in the standard of care.

Paluba v. MASG

Craig B. Merkle and **Adam Kelley** obtained a defense verdict in a wrongful death suit on behalf of a general surgeon in the Circuit Court for Wicomico County, Maryland. In the case of *Paluba v. MASG*, the plaintiffs alleged that the defendant surgeon failed to properly repair and treat an anastamotic leak discovered during a low anterior resection for rectal cancer. The patient's subsequent course was complicated by a persistent high ileostomy output, Klebsiella pneumonia, an inflamed abdominal aortic aneurysm, an infected endograft and an aortoenteric fistula. After 8 days of trial, the jury determined that the defendant had not breached the standard of care in the decisions made at the time of surgery or in the patient's postoperative management. Nine physicians testified during the trial on a wide range of issues, including, surgical oncology, infectious disease, vascular surgery, and gastroenterology.

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Ross v. Manor Care

Thomas V. Monahan, Jr. and **Elizabeth A. Hafey** obtained a defense verdict in favor of Manor Care Largo MD, LLC, a nursing home in Prince George's County, after a six-day trial. In *Lissa Ross v. Manor Care Largo*, the 10 children of James Johnson alleged that their father fell from a wheelchair at Manor Care Largo, sustained an injury to his brain that necessitated surgery six days later and, ultimately, died less than 24 hours after the brain surgery. After hearing defense experts in geriatrics, neurosurgery and neuroradiology, the jury concluded that there was no breach in the standard of care by any nurses or staff at Manor Care Largo.

Sheppard v. DCH

Craig B. Merkle and **Adam Kelley** obtained a defense verdict in *Sheppard v. DCH*, which was filed and tried in the Circuit Court for Prince George's County. The plaintiff alleged that she had sustained a tear of her airway when she was intubated for surgery to remove infected abdominal hernia mesh. The plaintiff developed significant air in her neck and mediastinum the day after surgery and was reintubated and hospitalized for an additional 10 days. Mr. Merkle and Mr. Kelley successfully represented the anesthesia team which consisted of an anesthesiologist and a CRNA.

Hoben v. Dr. S

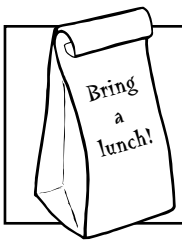
Craig B. Merkle and **Adam Kelley** obtained a defense verdict in the case of *Hoben v. Dr. S*, where the plaintiff alleged he sustained a bladder perforation as a result of a urethral sling placement and a cystodilation. The plaintiff developed multiple postoperative complications from the bladder perforation and repair that necessitated further surgery and 40 days in the hospital. Plaintiffs alleged negligent surgical technique, lack of informed consent and that the surgery was not indicated. The defense countered that all conservative measures had been exhausted to treat the plaintiff's incontinence following radical prostatectomy, that appropriate consent had been obtained, and that the bladder injury was a non-negligent and recognized complication of the procedures. After four days of evidence, a jury in the Circuit Court for Baltimore County returned a verdict in favor of the defense on all counts.

Reversing a $55 million verdict, Goodell DeVries obtains new trial from Court of Special Appeals in Baltimore City birth injury case.

One year after Johns Hopkins Hospital was hit with a verdict of $55 million in a single-plaintiff birth injury case, the Court of Special Appeals has vacated the judgment entirely and ordered a new trial. See *Martinez v. Johns Hopkins Hosp.*, 1394 SEPT TERM 2012, --- A.3 ----, 2013 WL 3337277 (Md. Ct. Spec. App. July 3, 2013). The Baltimore City verdict was widely cited as the largest medical malpractice award in Maryland history, exceeding even what the Plaintiffs' attorneys had requested.

However, legal error required a new trial. Specifically, the Hospital was precluded from putting on evidence at trial of the nurse-midwife's negligence on the grounds that the uninsured midwife was not a party in the case. Instead, the trial judge limited the Hospital to merely reciting what the nurse-midwife did and prohibited it from characterizing anything she did as improper, negligent, or in violation of the standard of care for nurse-midwives. Plaintiffs then exploited the ruling to repeatedly suggest to the jury that the midwife's grossly incompetent and dangerous treatment was appropriate for nurse-midwives. The appellate court explained that "the effect of the trial court's ruling was that Martinez was permitted to argue to the jury that [the midwife's] treatment of Martinez was appropriate. The Hospital, however, was precluded from arguing that [the midwife's] actions were negligent." Slip op. at 49.

Donald L. DeVries, Jr. led the **Goodell DeVries** appellate team that secured this important win. Assisting him on the briefing was **Janet A. Forero**, **Derek M. Stikeleather** and **Meghan Hatfield Yanacek**.



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