March 2021

THE DEFENSE LINE

A Publication From Maryland Defense Counsel, Inc.

The COVID Cases Are Coming

By John T. Sly & Nancy Ross

Also Featured

President's Message

Colleen K. O'Brien, Esquire
Travelers

Welcome to the Spring 2021 edition of the *Defense Line*. Thank you very much to our Publications Co-Chairs, Rachel Gebhart (GodwinTirocchi, LLC) and Nick Phillips (Thomas, Thomas & Hafer LLP), for continuing to deliver this newsletter to our membership.

MDC's Appellate Practice Committee has also been active since our last issue. I would like to recognize Peter Sheehan (Nelson Mullins Riley & Scarborough LLP), April Hitzelberger (Waranch & Brown, LLC), and Alicia Stewart (Downs Ward Bender Hauptmann & Herzog, P.A.) of the Appellate Practice Committee for coordinating MDC's submission of an *Amicus Curiae* Brief to the Maryland Court of Appeals in January. Thanks to Timothy Hurley, Peter Sheehan, and Richard Ochran (all of Nelson Mullins) for authoring the brief in the matter of *Clifford Cain v. Midland Funding LLC*. As a reminder, any MDC member is welcome to submit amicus opportunities for consideration to MDC via the Appellate Practice Committee.

MDC's Legislative Committee has had presence in Annapolis with the 2021 General Assembly session running from January through April. I would like to highlight Gardner Duvall (Whiteford, Taylor & Preston, LLP), who was a resource for Maryland Senate Bill 210 (COVID-19 Claim — Civil Immunity). This Bill provides civil immunity for a COVID-19 claim to a person acting in compliance with certain statutes, rules, regulations, executive orders, and agency orders, and not involving gross negligence or intentional wrongdoing.

Since our last issue, MDC has continued to bring additional online educational and social events to our members as well. Thank you to Bette McKenzie, Dan Kaplowitz, Erin B. Murphy, and Julie Soderlind (all of Exponent) for offering a virtual trivia night event to MDC in January, and congratulations to the winning team from Rollins, Smalkin, Richards & Mackie (a/k/a "Torts Illustrated"), who narrowly edged out the competition. Thanks also to Kim Trieschman and Farheen S. Khan (both of Rimkus Consulting Group) and Amy Askew (Kramon & Graham PA) for bringing us The Science of Human Factors: Case Studies from the Field program in February. We are looking forward to offering more programs to our members throughout the spring. Please join us on March 16, 2021 for the Use of Drones to Memorialize Accident Scene & Evidence in the COVID Era seminar, presented by William H. Daley III and Gavin D. O'Hare of CED Technologies, Inc., and moderated by Maryan Alexander (Wilson, Elser, Moskowitz, Edelman & Dicker, LLP). Be sure to visit MDC's website to register for our upcoming events, since MDC has been committed to offering these online educational events for free to MDC members.

With the ongoing global pandemic, MDC joined the MSBA and more than thirty other state bar associations in a letter to Governor Hogan, Chief Judge Barbera, and Acting Secretary of Health Schrader in February. The letter requested that additional members of the Maryland bar be added to Category 1C of the state's vaccine rollout in order to be consistent with CDC guidelines, and as Maryland moves to reopening the courts in April.

MDC will continue to provide a platform for our membership to advocate and connect. If you want to get more involved, please reach out to me.

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The Defense Line is a publication from Maryland Defense Counsel, Inc.

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The COVID Cases Are Coming

John T. Sly & Nancy Ross

As the legal and healthcare communities begin to wrestle with the complexities surrounding the COVID-19 pandemic, our message to clients is simple: *be prepared*. Be prepared in terms of their record-keeping. Be prepared regarding document retention. And, for lawyers, be prepared by understanding evolving rules and regulations related to the pandemic. Finally, when working with health care providers, be aware that many have experienced a great deal of stress during this pandemic.

Co-author, Nancy Ross, Esq., R.N., shares her experience taking care of the first ICU COVID patient in Maryland. Co-author, John T. Sly, Esq., then discusses key legal issues relevant to attorneys and health care providers.

The First COVID Patient — Ground Zero

My name is Nancy Ross. Before becoming a nurse, I was a lawyer. For as long as I can remember, when I planned my career, I knew I wanted to help those who needed help. After graduating from law school, I found that in my first policy job, I was able to help victims of domestic violence. I was on track. Fast forward 10 years, I had moved into state and then federal policy, and I felt further away from seeing the people that I helped. After serious contemplation, I decided to make a career change. I enrolled in an accelerated masters program in nursing, and, much to my joy, I loved my nursing school from my very first class. I particularly liked the clinical experiences, and from that point on, I knew I was in the right career.

After graduating with my masters in nursing, I took a job in critical care in a trauma unit in a major hospital. I love the intensity of my job; I appreciate my opportunity to examine all of the pieces of the medical issues confronting a patient. It is "on me" and a team of doctors and nurses to determine the best course of treatment for very sick patients. It is an honor to care for people in their most vulnerable time.

Perhaps the most challenging time in my 10 years of nursing has been working in an ICU COVID unit. I knew I wanted to be

a significant part of the frontline response to the pandemic. In very short time, the surgical and neurological intensive care unit (ICU) I was working in was transformed into the COVID ICU. I was assigned the very first ICU COVID patient, and experienced caring for a very sick patient without the support of their family. The unit of 16 beds filled to capacity in a matter of a week or two.

COVID patients are unable to inhale enough air into their lungs, which required nursing care beyond anything I had ever experienced. The patients require manual rotation from their backs to their stomachs for 16 – 20 hours each day. This critical process requires a respiratory therapist and 3 to 4 nurses or therapists to protect the patient's airway and lines to keep them alive and safe. The doctors and nurses I work with must make critical decisions about medication, and therapies, minute to minute at times. The 12 – 15 hour days are long, and the work is grueling. Yet, I would not want to be doing anything else.

Liability and Immunity Issues

Maryland:

On May 6, 2020, Maryland issued a critical Order. It provided that any licensed healthcare facility or healthcare provider resuming elective and non-urgent medical procedures must have at least one week's supply of personal protective equipment (PPE) for themselves, staff, and, as appropriate, for patients. This Order was renewed on October 1, 2020. The Hogan Administration made clear that PPE requests to any state or local health or emergency management agency would be denied for elective and non-urgent medical procedures. As a result, if your client is a Maryland healthcare provider performing elective procedures, or even seeing patients in their office, they must have the required PPE available. Regarding hospitals with COVID-19 patients, the Maryland Department of Health is responsible for determining a daily PPE-per-patient-use-rate for PPE requests. In addition, as COVID evolves, additional limitations on elective procedures may be imposed. Your clients must be aware of these evolving rules and comply with them.

Maryland's Order also required that any healthcare facility or healthcare provider must be able to procure all necessary PPE for its desired services via standard supply chains. One cannot rely on non-standard sources. Every healthcare provider must certify, in writing, that they are following Governor Hogan's Order. They must also certify that they will abide by social distancing standards, that all healthcare workers, patients, and visitors will be screened for COVID-19 symptoms upon arrival, and that the facility and staff will implement enhanced infection control measures in accordance with the most recent CDC guidelines.

We have been asked whether Good Samaritan laws apply to COVID-19 patient-related care. In Maryland, the Good Samaritan law provides limited immunity for care provided to a person where no payment is made, and no payment is expected. However, if your client was paid or expected to be paid for medical services, the Good Samaritan law does not apply.

While the Good Samaritan law does not apply where one is paid, Governor Hogan also has included and continues to include in the Proclamation Renewal of State of Emergency and Existence of Catastrophic Health Emergency — COVID-19, a provision that provides limited immunity when a healthcare provider is caring for a COVID-19 patient. In this instance, pursuant to Maryland Code, § 14-3A-01(b) of the Public Safety Article, "A health care provider is immune from civil or criminal liability if the health care provider acts in good faith and under a catastrophic health emergency proclamation." Based on this statute, it is the burden of the health care provider to

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demonstrate that (s)he acted in good faith. However, in Maryland, it is unclear whether this enhanced standard applies to patients who allege they contracted COVID-19 during care or whether it applies to patients who claim their care was delayed or impaired because of the pandemic. In other words, while the language appears to broadly apply to any health care provider treating a patient diagnosed with COVID-19, its application may be more narrow.

Federal:

At the time of this writing, Congress is discussing whether, and to what extent, it will extend immunity to healthcare providers working with COVID-19 patients. It is difficult to know if Congress will act, and when. However, there is some immunity applicable to COVID-related care under federal law. The Public Readiness Emergency Preparedness (PREP) Act was enacted in 2005 by Congress. The PREP Act authorizes the Secretary of the U.S. Department of Health and Human Services to declare that certain "covered persons" are immune from liability (in claims of tort or contract) for taking certain "covered countermeasures" that are necessary to combat a public health emergency such as COVID-19. On March 10, 2020, Secretary Alex Azar issued such a declaration, effective February 4, 2020. PREP Act immunity includes any claim under federal or state law for loss that has a causal relationship to the administration to or use by an individual covered by a countermeasure. A loss is defined as: death, personal injury, emotional injury, property damage, business interruption, or fear of personal injury.

PREP Act protection is very broad and applies "without regard to the date of the occurrence, presentation, or discovery of the loss." People covered by the PREP Act include healthcare providers, administrators, and support staff.

While the PREP Act appears to provide broad immunity, it is directed toward countermeasures in the fight against COVID-19. For example, these would include the use of non-NIOSH-approved KN95 respirators made in China and other medicines and intervention tools. Additionally, the CARES Act amended the Prep Act to cover respiratory protective devices. It is not clear whether it would immunize against claims of negligence brought by a patient where the allegation is that the healthcare provider generally acted negligently in their care of the patient. Indeed, on the face of the statute, we do not believe it does.

Further, the CARES Act protects voluntary health care providers that treat COVID-19 patients. We have seen healthcare providers travel outside their home state to heroically assist COVID hotspots. Depending on the circumstances, they may further be immune from suit under the federal Volunteer Protection Act of 1997 (VPA). The VPA establishes that volunteer healthcare professionals of non-profit organizations or governmental entities are not liable for economic damages stemming from medical care provided within the scope of their volunteer responsibilities.

In light of the pandemic, on March 17, 2020, Secretary Azar issued a limited waiver of certain HIPAA sanctions for healthcare providers to improve data sharing and expand telehealth patient care during the pandemic. It is important to note, however, that the HHS did not waive or extend the 60-day time limit for medical providers to notify affected patients of a breach of their protected health information. How these points will impact one another will certainly be the subject of coming litigation.

Enhanced Informed Consent

During this pandemic, healthcare providers should remind themselves of how to properly obtain a patient's informed consent. While a physician extender, partner, or nurse can provide supplemental information about treatment options, *the individual who provides the care is personally responsible for obtaining informed consent.* As always, the health care provider must discuss the risks, benefits, and alternatives to any care option with your patients. During these discussions, they should disclose any additional risks due to COVID-19. If they have data regarding the risks of treatment, they should provide it to their patients either verbally or in writing. Be aware that as a patient's condition changes, or as your knowledge of the patient's condition changes, the health care provider *must* obtain informed consent again. Keep this requirement of the informed consent process in mind, because our evolving understanding of COVID-19 can have a direct impact on risks of treatment for their patients.

Further, documenting the consent conversations with patients is essential to protecting a health care provider against informed consent claims, as is obtaining signed consent forms. Due to the impact of the pandemic on healthcare, we recommend incorporating additional language into informed consent forms. Consider the following example:

COVID-19 is an infectious virus that currently has no direct treatment and for which there is no current vaccine. While we have taken reasonable steps to limit the potential for transmission of COVID-19 in our office, you agree that you understand transmission of COVID-19 is still possible.

You understand that our office offers a HIPAA compliant telemedicine option. However, your care and/or your preference requires an in-person visit with our staff and healthcare providers. When required to provide you care, our staff and healthcare providers may be within six (6) feet of you and may touch you and your personal objects. You understand that person-to-person contact may increase the chance of COVID-19 transmission. It may be necessary that you quarantine and/or take other steps in the event it is determined that you may have been exposed to COVID-19.

You further understand that recommendations and guidelines regarding COVID-19 are subject to modification.

Telehealth

We have been hearing of the coming of telehealth for years. However, in the wake of the COVID-19 pandemic, Maryland has dramatically expanded the availability of telehealth. There are some critical points to keep in mind as we move into this "Brave New World." Recall that telehealth, regardless of the formality of the platform a health care provider is using, is still real medicine. All negligence rules still apply. Further, all HIPAA rules still apply, and this is particularly critical when communicating electronically. The health care provider must ensure that the communication modalities are HIPAA compliant.

Asynchronous, *i.e.*, not real-time, communication with patients is expanding.

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Maryland, for example, expressly allows it. With asynchronous communication comes additional and different risks. If a patient leaves a message the night before and a health care provider prescribes a medication the following morning, the health care provider must be sure that the condition of the patient has not substantially changed. How often and in what circumstances the health care provider needs to recommunicate with the patient is unclear. We recommend that a health care provider use their best judgment and be sure to document their thought process.

Speaking of documentation, it is even more critical in light of the increase in telehealth. Other than the health care provider and the patient, there is often nobody else who knows they interacted. A health care provider cannot call their secretary as a witness to demonstrate the patient came into the office when they may be communicating with the patient from home at night. Document! Document! Document!

Finally, with regard to telehealth, a health care provider must be sure to have procedures in place that provide for document retention. Patients may wish to use all of the various communication modalities available today. If a health care provider communicates with them through those modalities, they must save those communications. Otherwise, the health care provider may find their chart bereft of documentation even when they were actively engaged with the patient.

Prepare for potential litigation

Due to COVID-19, we find ourselves working remotely, in unfamiliar circumstances, and using new communication modalities. A healthcare provider must do what they can to protect themselves from lawsuits and, if one is filed, be ready to vigorously defend themselves.

A health care provider must be sure to record what they knew and when regarding COVID-19 and relevant recommendations. We have all watched as our knowledge of the virus has changed dramatically since February of 2020 and, as a result, have seen guidelines and recommendations evolve accordingly. Will the health care provider recall what their understanding was on a particular date if they fail to document it now? Because of this dilemma, we recommend that they obtain/collect all CDC and state recommendations and orders. They may wish to document what they have done to protect patients from the virus including videotaping/photographing their office to show signage, sanitizer dispensers and other steps they have taken.

Health care providers should ensure that their staff and colleagues are familiar with the rules, regulations, and statutes related to COVID-19. In fact, a health care provider should consider designating a person or a team to coordinate COVID-19-related training and to field COVID-19-related complaints from patients.

A health care provider may wish to create a timeline that includes the information they know/have known about COVID. Also, consolidate maintenance of tracked staffing allocation, PPE supplies and ventilators, and assure those records are maintained in their repository of information.

If a health care provider maintains a large practice or works in a hospital, they should plan today for the potential need for a corporate representative in the future that can speak on behalf of an organization during litigation. It is advised that they have someone they trust who can speak to what was being done and why. It will be much harder years later in litigation to get someone up-to-speed.

We expect a range of claims arising out of this pandemic. Some are obvious, such as the failure to timely diagnose COVID-19 — or a failure to diagnose it at all. But also consider that plaintiff lawyers are creative. They will likely, where possible, bring suits alleging:

- Delay or denial of deemed "elective" or "non-essential" care to patients that is later asserted to be critical in the course of treatment;
- Negligence whereby patients and family members are infected with COVID-19 by "community spread" in a clinic or office setting;
- Negligent treatment of COVID-19 (consider whether the PREP Act provides immunity for this);

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Editors' Corner

The editorial staff are proud to present this edition of *The Defense Line*. As always, we are grateful to you, members of the MDC, who answer the call for articles, advice, resources, and spotlights. We are especially pleased to present submissions in this edition highlighting the continued successes of our members as we adapt to the ongoing challenges brought on by the pandemic. We wish to thank the following individuals for their contributions to this edition: **Jeff Trueman** of Jeff Trueman, Esq., Mediator & Arbitrator, **Joshua Kahn** and **Daniel Adamson** of Miles & Stockbridge, **John Sly** of Waranch & Brown, LLC and **Nancy Ross** of Ross Legal Nurses, LLC.

The Editors sincerely hope the members of the MDC enjoy this edition of *The Defense Line*. If you have any comments or suggestions, or would like to submit material for a future edition, please contact the Publications Committee.

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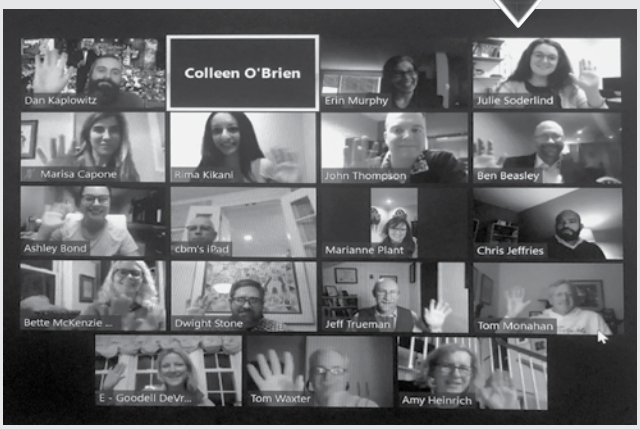
MDC's Virtual Trivia Night

Maryland Defense Counsel ("MDC") and Exponent hosted their first Virtual Trivia Night on **Tuesday, January 12, 2021** on Zoom.

Following a heated competition, including a tie breaker question, the winning team was "Torts Illustrated"— consisting of **Rima Kikani** (Captain), **Ben Beasley**, **Ashley Bond**, and **John Thompson** — all of Rollins, Smalkin, Richards & Mackie, LLC.

Congratulations to all our players, and thank you to Exponent's Trivia Masters — **Dan Kaplowitz**, **Erin Murphy**, and **Julie Soderlind**!



Exponent®

Meet your Exponent Hosts!

Dan Kaplowitz, Ph.D., P.E., CWI

- Managing Engineer at Exponent
- Metallurgist, professional engineer, certified weld inspector
- Works with: weld failures, pipeline ruptures, and consumer product failures
- Fun fact: went to UMD!

*Pre-COVID-19 appearance

Erin Murphy, Ph.D.

- Managing Scientist at Exponent
- Polymer scientist
- Works with: broken plastic and rubber components, adhesives and coatings, and trace component analysis
- Fun fact: rides motorcycles (typically one at a time)!

Julie Soderlind, Ph.D.

- Associate at Exponent
- Metallurgist
- Works with: materials characterization and testing, corrosion analysis
- Fun fact: loves gardening and golf!

(COVID) *Continued from page 7*

- Delay or denial of care due to lack of facility capacity or access to medical equipment due to patient overload;
- Negligence in not guarding against "community spread" of COVID-19 in sensitive areas such as ICU, cardiology, surgery, oncology, etc.;
- Failure to communicate infection rates;
- Failure to prevent the development of pressure ulcers because of staffing issues; and,
- Failure to prevent falls due to understaffing.

If a health care provider is sued, be sure to have them contact their risk manager or insurance company immediately. If there is good documentation, as discussed in this article, the health care provider will be in a strong position to defend what they did because they will know when and why they did it.

We hope this article provides you with a roadmap on how you can effectively protect yourself from lawsuits while continuing to help protect yourself, your patients, and your staff from COVID-19.

John T. Sly is a partner with Waranch & Brown, LLC and is a past President of MDC. John has also been named to Super Lawyers through 2021. waranch-brown.com/people/john-t-sly/

Nancy Ross is a nurse in the Surgical/Neurological Intensive Care Unit in a hospital in the suburbs of Washington, D.C.. She is also a Legal Nurse Consultant and the Owner of Ross Legal Nurses, LLC.

Managing Mistrust in Mediation

Jeff Trueman

I often hear lawyers and parties express frustration over the adversarial nature of some mediation sessions. They want to negotiate openly without posturing. But enough lawyers engage in overly competitive tactics to make the process arduous and aggressive at times. Common tactics include pressing specious arguments, concealing significant information, obscuring weakness, diverting attention from the main evidentiary risk, misleading others about the existence or persuasive power of evidence not yet presented (experts, fact witnesses), resisting client-responsive suggestions, injecting hostility, remaining attached to positions not sincerely held, delaying access to information sought by other parties, and protracting the proceedings to wear down the other side.

It's hard to set the tone for productive, cooperative settlement talks when counsel threaten to crush each other in court. The process takes much longer when the mediator has to redirect everyone's mindset back to making a deal. Parties who seek litigated value in settlement talks also soak up precious time. No one likes to bargain with positions that are not realistically maintained; it's harder to get a deal when people are antagonistic. Withholding or unveiling "bombshell" information is another common tactic that will interfere with productive talks. It destroys any sense of good-will, assuming any exists at the outset, and usually derails the process.

These problems reflect a lack of trust between counsel and/or the parties. Sometimes the dynamic may be to blame rather than the behavior of counsel. For example, when bargaining over limited resources, such as insurance proceeds, perhaps parties should not be completely honest with each other. Important ethical issues are raised in distributive bargaining contexts where one party's gain is another's loss. One party's "reasonable" opening position is often exploited by her opponent. Full and candid disclosure may feel altruistic but it surrenders valuable information the other side wants to know. Although the needs and fears of a party should not determine the price one gets, that's exactly what the other side wants to know. In my opinion, until some degree of trust in the mediator and in the mediation process is established, there are sound reasons to conceal some information and outcome goals, especially in distributive bargaining contexts.

When attorneys trust each other, however, they generate better outcomes for themselves and their clients; the experience is less frustrating and more rewarding. As stated to me by a personal injury attorney, "If we know and trust counsel on the other side, they get better numbers from us." Lawyers who value good working relationships with each other and with claims professionals keep the big picture in mind. A good working relationship takes time to build and can be easily destroyed with obfuscation and posturing. Much of the time, however, trust is in short supply in mediation. This is where a good mediator can help by building rapport with party participants and bridging the gap where mistrust exists between opposing parties.

It takes time to establish rapport and trust. It can vanish in an instant — "trust comes by turtle and leaves by jaguar." It's a good sign when I am asked by counsel or her client, "How should we proceed?" But even then, I am careful because in competitive bargaining dynamics, participants may use anything to gain leverage, including the rapport I have developed with the opposing side.

Good mediators also bridge the gap in trust between opposing sides. As brokers of information, mediators have to be trusted by the participants and counsel to perform dual roles that communicate and filter information with credibility. This can be tricky, however, because mediators are not in a good position to assess the trustworthiness or reliability of any of the participants. Given the adversarial nature of mediating litigated cases where information is guarded and bargaining positions can be deceptive, it may be difficult for mediators to discern which facts and figures are truthful and which are not. For these reasons, in my view, you have good reason to be skeptical of mediators who vouch for anyone's bargaining position.

In my experience, the way around these issues is to manage the bargaining process. Your mediator should have a good sense of timing and patience to help counsel avoid reacting to inflammatory rhetoric or insulting moves from the other side. "Banging heads" through multiple bargaining rounds takes time; like landing a plane, it is a process where gradual is better than sudden. After all the tactics have been exhausted and lines in the sand drawn, strategic management of the bargaining process often results in an "apex" or critical conversation between counsel and client. As golfers know, once the ball is on the green, the cup will come to you.

Jeff Trueman, Esq., an independent mediator and the former director of Civil ADR for the Circuit Court for Baltimore City, can be reached at jt@jefftrueman.com.

MDC & CED Technologies, Inc. Present

Use of Drones to Memorialize Accident Scene & Evidence in the COVID Era

Tuesday, March 16, 2021
11:00 am EST – Noon EST

Presenters: **William H. Daley III** & **Gavin D. O'Hare**, CED Technologies Inc.
Moderator: **Maryan Alexander, Esq.**, Wilson, Elser, Moskowitz, Edelman & Dicker, LLP

Now, more than ever, evidence and accident scene inspections must follow the CDC's social distancing guidelines. Drones maximize what can be seen and minimize human contact. Live drone video taken can be a screen share to a Zoom meeting where interested parties far away can also participate in an inspection.

Free to MDC Members | $30 for Non-Member Attorneys

Register: **www.mddefensecounsel.org/events.html**

A Zoom link for the webinar will be circulated to registrants prior to the event.

William H. Daley III *is the President of CED Technologies Inc. Mr. Daley holds a Bachelors degree from the United States Naval Academy along with a Masters Degree from the US Naval Postgraduate School. Prior to joining CED Technologies in 1995, Mr. Daley served on active duty for 20 years in the U. S. Navy. Mr. Daley's naval service included engineering and weapons engineering assignments on four different ships, as well as serving as the Associate Chairman of the Mechanical Engineering Department at the U. S. Naval Academy. Upon completing his naval service as a commander, Mr. Daley became Director of Manufacturing for Forward Technology Industries, Inc. Mr. Daley is also a senior mechanical engineer investigating accidents involving machinery operation and guarding, consumer products, slip & falls, and marine accident reconstruction.*

Gavin D. O'Hare *is the Director of Corporate Business Development for CED Technologies Inc. He holds a Bachelors Degree from the United States Naval Academy in Engineering and Political Science along with a Masters Degree in Business Administration from the University of Phoenix. Prior to joining CED, Mr. O'Hare was the Director of Intercollegiate Sailing at the United States Naval Academy along with being an adjunct professor in the Economics Department. Prior to the U.S. Naval Academy, Mr. O'Hare has held positions such as Product Manager, Account Manager and several Business Development roles.*

Maryan Alexander, Esq. *represents clients and insurers in state and federal court in Maryland and the District of Columbia in complex civil litigation matters, including commercial disputes, accountant professional liability, premises liability, products liability, toxic torts and other general casualty claims. She has defended at trial large financial institutions, property management companies, and local and foreign product manufacturers and distributors in matters involving allegations of negligence, violations of consumer protection acts, fraud/misrepresentation, and breach of contract and warranties.*

Sponsor: CED TECHNOLOGIES INC SCIENCE EXPLAINED

Practice Pointers from the Pandemic

On **Monday, December 7, 2020**, Maryland Defense Counsel ("MDC") hosted a virtual discussion called "**Practice Pointers from the Pandemic**."

Deans of the Bench and the Bar provided hints for virtual depositions, hearings, and mediations. During this age of social distancing, this seminar took the civil defense litigator through the COVID-19 pandemic and beyond.

MDC would like to thank the presenters and sponsors who made this very informative event possible.

Taking the Virtual Deposition: the Plaintiff, the Witness, and the Expert

Thurman W. Zollicoffer, Jr.
Nelson Mullins

Defending the Virtual Deposition: The Corporate Representative *(including prep.)*

Amy E. Askew
Kramon & Graham

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Virtual Exhibit Table & Break

Nate Pascal
Planet Depos

The Virtual Motions Hearing

Hon. Michael J. McAuliffe
Montgomery County Circuit Court

The Virtual Motions Hearing

M. Natalie McSherry
Kramon & Graham

The Virtual Motions Hearing

John T. Sly
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Kimberly A. Treischman
Rimkus Consulting Group, Inc.

Virtual Mediations

Dwight W. Stone, II
Miles & Stockbridge

Virtual Mediations

Hon. Martin P. Welch (Ret.)
The McCammon Group

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Virtual Exhibit Table

Rob Hellewell
Lighthouse eDiscovery

Welcome & Wrap-Up

Colleen K. O'Brien
MDC President

Md. High Court to Defendants: Don't Show Up Empty Handed When Using the "Empty Chair" Defense

Joshua F. Kahn & Daniel L. Adamson

The "empty chair" defense, where the defendant denies responsibility for the plaintiff's injuries and blames a person absent from trial (i.e. the "empty chair"), can be extremely effective in tort actions. The Court of Appeals of Maryland has rightly observed that "[t]he more the jury hears that the negligence of a third party caused the injury, the less likely the jury may be to find that the named defendant was negligent in causing the injury." *Am. Radiology Servs., LLC v. Reiss*, 470 Md. 555, 589 (2020).

In *Reiss*, the Court of Appeals grappled with a question at the heart of the successful use of the empty chair defense in many complex tort cases: must an empty chair defense be accompanied by enough expert testimony that the jury could find the absent party liable? The court answered in the affirmative, holding that expert testimony is generally required to establish the non-party's breach of the standard of care and causation. Without this critical evidence, the jury should not be permitted to consider the question of a non-party's negligence.

The Trial

The Facts

The plaintiff was diagnosed with a tumor on his kidney and an adjacent enlarged lymph node. In 2011, the plaintiff's urologist, Dr. Davalos, surgically removed the tumor but was unable to remove the lymph node due to its proximity to a large blood vessel, the inferior vena cava.

Following surgery, the plaintiff was treated by an oncologist, Dr. DeLuca, who believed the enlarged lymph node was cancerous, but like Dr. Davalos, believed it could not be removed due to its proximity to the inferior vena cava. Dr. DeLuca treated the plaintiff with chemotherapy that caused the node to shrink.

Over the course of several years, Dr. DeLuca ordered periodic CT scans of the lymph node. Dr. Bracey, a radiologist, evaluated several CT images of the plaintiff's lymph nodes and noted no sign of enlargement. Because Dr. DeLuca did not order the CT images to be performed with IV contrast, which enhances the clarity of the images, Dr. Bracey noted that the images were difficult to interpret. Another radiologist, Dr. Ahn, also interpreted a non-contrast scan of the plaintiff's lymph node. Like Dr. Bracey, Dr. Ahn did not report signs of enlargement.

A third radiologist evaluated a non-contrast CT scan in 2015 and found signs of enlargement of the lymph node. Dr. DeLuca and another oncologist confirmed that the node was cancerous and inoperable due to its location.

Pre-trial

The plaintiff filed a medical malpractice lawsuit against the radiologists, Drs. Bracey and Ahn, and the urologist, Dr. Davalos. As to the radiologists, the plaintiff claimed they breached the standard of care by failing to alert Dr. DeLuca of the growth of the diseased node when it could have been safely removed. As to Dr. Davalos, the plaintiff claimed he was negligent by failing to remove the lymph node during the 2011 surgery. The plaintiff later voluntarily dismissed Dr. Davalos, leaving the radiologists as the lone defendants.

During discovery, the radiologists denied liability and sought to invoke the empty chair defense by claiming that non-party physicians, namely the oncologists, were negligent and caused the plaintiff's injuries. The radiologists designated experts who rendered opinions that they did not breach the standard of care or cause the plaintiff's injuries. Importantly, they did not designate any expert to opine on negligence or causation with respect to the non-party physicians. Instead, in their expert designations, the radiologists simply "included a *pro forma* statement advising that they reserved the right to rely on the opinions of Plaintiff's experts." 470 Md. at 565. In a pre-trial ruling, the trial court precluded the radiologists from eliciting expert opinions from the plaintiff's experts concerning the negligence of the non-party oncologists due to the lack of an appropriate expert designation.

Trial

At trial, no expert witness testified that Dr. Davalos breached the standard of care by not removing the lymph node during the 2011 surgery, or that the standard of care required the oncologists to refer the plaintiff to a surgeon to remove the lymph node or biopsy it. On cross-examination of one of the plaintiff's experts, in accordance with the court's pre-trial ruling, the court sustained the plaintiff's objection to defense counsel's attempt at eliciting opinions about whether Dr. Davalos breached the standard of care.

Nonetheless, over the plaintiff's objection, the verdict sheet included a question as to whether a negligent act committed by Dr. Davalos or the oncologists was a substantial factor in causing injury to the plaintiff. The jury initially returned a verdict finding that: (1) the defendant radiologists did not breach the standard of care; (2) the non-party physicians' negligent acts caused the plaintiff's injuries; and (3) awarding the plaintiff $4.8 million in damages (notwithstanding their finding that the defendants were not liable). The court explained to the jury the inconsistency in their verdict and, over the plaintiff's objection, sent them back to deliberate again with the same verdict sheet. The jury returned another verdict finding only that the defendant radiologists did not breach the standard of care.

The Appeal

The Court of Special Appeals reversed the judgment, holding that the radiologists could not generate a jury question as to the negligence of the non-party physicians without expert testimony that those physicians breached the standard of care. Consequently, the question of alternative causation concerning the non-party physician's negligence should not have been submitted to the jury. The Court of Appeals

Continued on page 15

(EMPTY CHAIR) *Continued from page 14*

agreed.

The Court began by discussing two recent appellate decisions providing the framework for the admissibility of evidence of non-party negligence in medical malpractice cases: *Martinez ex rel. Fielding v. Johns Hopkins Hosp.*, 212 Md. App 634 (2013), and *Copsey v. Park*, 453 Md. 141 (2017). Those cases establish that a defendant who generally denies liability may introduce evidence of non-party negligence to prove: (1) that they are not liable for a plaintiff's injuries; or (2) that the non-party's acts were a superseding cause "that cleaved the chain of causation running from defendant's negligence." *Reiss*, 470 Md. at 578.

The question in *Reiss*, however, was not *whether* evidence of non-party negligence was admissible. Rather, the question was whether the radiologists presented *enough* evidence to generate a jury question as to the negligence of the non-party physicians.

The Court ultimately held:

> [W]here a defendant elects to pursue a defense that includes non-party medical negligence, the defendant must produce the requisite expert testimony necessary to establish medical negligence and causation, unless the non-party's medical negligence is so obvious that ordinary laypersons can determine that it was a breach of the standard of care.

Id. at 584. The Court's rationale was rooted in Maryland's traditional standard for proving negligence in a medical malpractice case, namely, that expert testimony is required to establish a physician's negligence and to explain how the physician's breach caused the injury. *Id.* at 580.

Notably, the Court explained that its holding did not require a defendant raising an empty chair defense to call their own experts. Rather, the evidentiary burden may be satisfied through examination of another party's expert(s) so long as the defendant properly designates such testimony during discovery.

Because the radiologists did not present sufficient evidence to generate a jury question as to whether the non-party physicians were negligent or caused the plaintiff's injuries, the inclusion on the verdict sheet of a question about the negligence of the non-party physicians was prejudicial, necessitating a new trial.

Key Takeaways

Although *Reiss* was a medical malpractice case, the principles underlying the holding are applicable in any complex tort case where a defendant seeks to effectively use the empty chair defense. In such cases, *Reiss* raises a number of important strategic points and reminders for defendants and their counsel to consider when formulating their discovery and trial strategy:

First, defense counsel should consider whether an empty chair defense exists. In multi-defendant cases, defense counsel must be cognizant that, through settlement or change of the plaintiff's theory, a defendant at the commencement of the lawsuit may become a non-party by the time of trial. Defense counsel should not only be considering the empty chair defense as to parties who were never sued, but also as to those who are or were named defendants. Equally important to identifying the empty chair defense is identifying the evidence that will be necessary to get the question of a non-party's negligence to the jury. (Of course, the same exercise should be undertaken for cross- and third-party claims.) In Reiss, the radiologists never designated their own experts to testify on the negligence of the non-party physicians, and their designation of the plaintiff's experts was ruled insufficient under the Maryland discovery rules (which ruling was not appealed). This led to the order precluding the radiologists from eliciting testimony at trial that the Court of Appeals later recognized was essential to their empty chair defense. The radiologists' failure to properly designate expert testimony supportive of their empty chair defense, combined with the trial court's inclusion of the empty chair defense question on the verdict sheet, was nothing short of disastrous for the radiologists, who lost their defense verdict on appeal.

Second, a defendant's failure to produce sufficient evidence to support an empty chair defense risks pre-trial resolution of the issue before the defense is ever heard by the jury. A defendant who takes care to identify the evidence needed to put on an empty chair defense and properly designates the expert testimony necessary to present the defense should be well-prepared to stave off pre-trial attacks seeking to destroy this flagship defense.

Finally, *Reiss* provides a reminder that, when carefully planned and deployed, the empty chair defense can be an effective weapon in the defense attorney's arsenal for securing a favorable verdict. As mentioned, Maryland's appellate courts have established that, where a defendant denies liability, evidence of non-party negligence is admissible to prove that the defendant is not responsible for the plaintiff's injuries, and to establish a break in the causal chain between the defendant's conduct and the plaintiff's injuries. Supplying the jury an alternate theory of causation, of course, can be critical in catastrophic personal injury cases where the jury may sympathize with the plaintiff. A carefully planned and presented empty chair defense can satisfy this objective by allowing the jury to conclude that the person responsible for the plaintiff's injuries is the "defendant" beyond the courtroom, rather than the one in it.

Joshua F. Kahn is a principal in the Products Liability & Mass Torts Practice Group at Miles & Stockbridge. His practice spans products liability and toxic tort defense, class actions, and high-stakes business and personal injury disputes.

Daniel L. Adamson is an associate in the practice and works on a broad range of personal injury, business, and environmental disputes.

The MDC Expert List

The MDC expert list is designed to be used as a contact list for informational purposes only. It provides names of experts sorted by area of expertise with corresponding contact names and email addresses of MDC members who have information about each expert as a result of experience with the expert either as a proponent or as an opponent of the expert in litigation. A member seeking information about an expert will be required to contact the listed MDC member(s) for details. The fact that an expert's name appears on the list is not an endorsement or an indictment of that expert by MDC; it simply means that the listed MDC members may have useful information about that expert. MDC takes no position with regard to the licensure, qualifications, or suitability of any expert on the list.

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.

Amicus Brief

Timothy M. Hurley, Peter W. Sheehan, & Richard Ochran



Maryland Defense Counsel submitted an *Amicus Curiae* brief to the Court of Appeals of Maryland in the matter of *Clifford Cain v. Midland Funding LLC*, Case No. COA-REG-0038-2020. The *Cain* case, a putative class action lawsuit, involved allegations that the Defendant/Respondent, Midland Funding LLC, obtained a judgment against Mr. Cain in a collection action that was void. Mr. Cain was previously a putative class member in a lawsuit filed in the U.S. District Court for the District of Maryland. When the Maryland federal court excluded him from the proposed class in that lawsuit, Mr. Cain filed a new class action lawsuit in the Circuit Court for Baltimore City. On appeal, the Court of Special Appeals held that Mr. Cain's claims against Midland Funding, LLC were time-barred under the applicable statute of limitations. In doing so, the Court of Special Appeals rejected Mr. Cain's argument that the limitations period for his claims was tolled while he was a putative class member in the federal court lawsuit.

Although the *Cain* case has a complicated procedural history and involves numerous issues on appeal, the MDC's *Amicus Curiae* brief was limited to a single issue: Whether the Court of Appeals should recognize cross-jurisdictional class action tolling under the circumstances presented in Mr. Cain's case. In its Brief, MDC argued that the Court should decline to do so for two compelling reasons. First, MDC urged the Court of Appeals to join the growing number of states that have rejected the doctrine of cross-jurisdictional class action tolling. Although the Court of Appeals has recognized that a tolling exception for putative class members in Maryland state court actions who later seek to pursue individual claims in Maryland courts (*Philip Morris USA, Inc. v. Christensen*, 394 Md. 227 (2006)), the Court has never addressed whether that same tolling exception applies when the initial class action lawsuit was filed outside of Maryland state courts. Like the numerous other states to reject this form of tolling, MDC reasoned that such a generous tolling exception would lead to forum shopping and invite out-of-state litigants to bring their claims in Maryland state courts, thereby draining the Maryland judiciary's resources. Second, MDC argued that the Court should not apply the *Christensen* tolling exception where a claimant seeks to file new class action lawsuit outside of the limitations period. As the Supreme Court recently observed in *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800 (2018), permitting a plaintiff to file a new class action lawsuit under these circumstances could allowing the plaintiff to extend the statute of limitations indefinitely through the filing of repeated, successive class action lawsuits outside of the limitations period. MDC recommended that the Court of Appeals adopt the Supreme Court's holding in *China Agritech*.

Oral argument in the Cain case is scheduled for March 4, 2021.

Tim Hurley, a partner at Nelson Mullins, represents manufacturers in a variety of matters involving products liability and mass tort litigation. These matters often involve multiple parties and multiple claims such as those arising from occupational exposures and other allegedly hazardous substances. He also handles national and local commercial disputes and complex business and financial services litigation.

Peter Sheehan, a partner at Nelson Mullins, is an experienced litigator, focusing primarily on administrative law, products liability defense, business litigation, and appellate practice. He has tried cases to verdict (bench and jury trials) and prosecuted and defended appeals in state and federal appellate courts. In his administrative law practice, he counsels individuals and businesses in a variety of fields on strategies for resolving regulatory and licensing disputes informally and, when necessary, through litigation. Peter is a past chair of the Maryland State Bar Association, Administrative Law Section. Additionally, Peter co-chairs Maryland Defense Counsel's Appellate Practice Committee.

Richard Ochran, an associate at Nelson Mullins, focuses his practice in litigation. He represents clients in products liability, business and commercial torts, premises liability, employment litigation, and general litigation. He has experience counselling clients in pre-litigation and investigation, developing case strategy, and drafting motions.

MGM Trial Services is Tapped to Support the First Multi-Day Civil Jury Trial in Maryland Since the Covid-19 Shutdown

MGM Trial Services

When the Maryland Judiciary announced that jury trials would resume in Mid-October, MGM Trial Services was tapped to support the very first multiday civil jury trial in Maryland, which took place in Baltimore County.

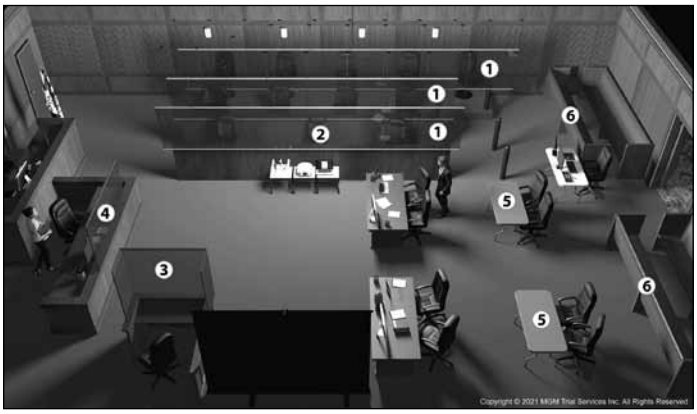
Why MGM Trial Services

Besides using state of the art display technology and producing dynamic demonstrative exhibits for the past 20 years, MGM had the expertise and experience to configure the courtroom with an array of equipment and technological resources that would allow the trial presentation process to proceed smoothly and efficiently, regardless of the physical and visual limitations of this new Covid-19 courtroom.

What We Found: The New Covid-19 Courtroom.

The Covid-19 courtroom in Baltimore County had been reconfigured to minimize the transmission of the virus utilizing the following modifications:

1) The jury box was expanded into the well of the courtroom to form 3 rows of seating rather than 2 rows. The purpose was so that the jurors would have 6+ feet of lateral space between them.
2) Plexiglass sheets were then hung from the ceiling to isolate the jury rows from one another.
3) The witness stand was fitted with a 3 walled plexiglass shield.
4) The Bench, as well as the Clerk's desk were fitted with plexiglass shields.
5) Additional tables were set up behind counsel's table for the parties.
6) Gallery seating was reduced.



How MGM Overcame the Challenges Presented by the New Covid-19 Courtroom.

1. Overcoming the jurors ability to see the exhibits through the installed plexiglass barriers.

Ultimately, the solution was to dim the lights but MGM had a backup plan if dimming the lights proved to be an unacceptable solution. We had a supply on hand of small, personal LED monitors and mobile stands ready to set up for any or all of the jurors struggling to see the digital evidence presented on the screen.

2. Overcoming an expert witnesses' reluctancy to testify in person.

Since 2017 MGM Trial Services has been using Zoom as the backbone for its UltraDep Remote deposition service. UltraDep Remote was developed to harness the power of mobile video conferencing in order facilitate a deposition in which a witness was unable to testify in person. Pre-Covid, attorneys used UltraDep Remote to take recorded, interactive multi-media video depositions of a witness at a distant location.

When the Covid-19 crisis shut down the courts, we already had the tools in place to assist attorneys with the display of digital evidence during video conference depositions. It's this same technology, expertise and know-how that we rely upon to facilitate live, remote witness testimony in the courtroom.

We're happy to say that throughout the 7-day trial, our experience, equipment, and technology allowed MGM to successfully provide the court, the jurors and our clients with a streamlined, robust, and adaptable presentation system that performed without incident in the very first multi-day, civil jury trial since the Corona Virus shut down the courts back in late March.

It's safe to say that each jurisdiction, each courtroom, and each trial will present a different set of obstacles for trial presentation logistics. Our ability to bring the expertise and a wide array of solutions to each trial is paramount to our clients successfully trying their cases in the Covid-19 environment.

MGM TRIAL SERVICES, INC.

Spotlights


John Sly and **Tony Breschi** of Waranch & Brown obtained a defense verdict in *Bolyard v. Benalcazar*, Case No. 03-C-18-011094MM, before a jury over 7 days in the Circuit Court for Baltimore County beginning on October 15, 2020. This medical malpractice case was tried before retired Judge Mickey Norman.

The Plaintiff complained of permanent neurological injuries from a carpel tunnel surgery. She alleged that the failure to perform an open surgery, rather than an endoscopic procedure, led to a failure to identify the median nerve and the resulting injury. She also claimed a lack of informed consent. Defendants presented testimony from experts in neurosurgery, neurology and life care planning.

Given the restrictions imposed by the COVID-19 pandemic, a major hurdle in trying the case was communication. Use of audio-visual media, wireless communication with counsel and the judge for bench conferences and speaking at a high volume were important in order to overcome the multiple layers of plexiglass separating jurors and the judge from counsel. John and Tony are happy to share their experience with any MDC counsel who have questions.



On February 24, 2021, in the federal sex trafficking matter, *J.L. v. Best Western International, Inc., et al.*, 1:19-cv-3713 (D. Colo.), **Marisa Trasatti**, **Robert E. Scott, Jr.**, and **Kevin Foreman**, successfully achieved dismissal of the First Amended Complaint against a major U.S. hotel brand in a federal civil case arising from alleged sex trafficking on premise in the U.S. District Court for the District of Colorado. Judge Brimmer granted the Motion to Dismiss with prejudice as to all claims after permitting one round of repleading by Plaintiff. The First Amended Complaint alleged one (1) count against each Defendant under the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA"). Other brand Hotelier Defendants also prevailed.

Eighth Circuit Court of Appeals Affirms Defense Verdict in Favor of Crown Equipment Corp.



In July 2018, **Thomas J. Cullen, Jr.**, **Kali Enyeart Book**, and **Ryan M. Cullen** of Goodell, DeVries, Leech & Dann, LLP obtained a full defense verdict in favor of Crown Equipment Corporation ("Crown"), a leading manufacturer of material handling equipment, in the United States District Court for the Northern District of Iowa, Eastern Division. In *Dustin Reinard, et al. v. Crown Equipment Corporation*, Plaintiffs alleged Crown's stand-up rider forklift's open operator compartment was defective in design because it lacked appropriate guarding, which allegedly caused plaintiff's below-the-knee leg amputation. Plaintiffs had moved *in limine* to exclude certain video simulations of foreseeable accident scenarios prior to trial. The trial court denied their motions. Plaintiffs then strategically introduced the simulations in their case-in-chief to "ease the sting" of this evidence. Following the verdict, Plaintiffs moved for a new trial arguing that the trial judge erred in admitting the video simulations. The motion was denied and Plaintiffs appealed to the 8th Circuit Court of Appeals.

In September 2020, Tom Cullen argued before the 8th Circuit panel that, first, the evidence was correctly admitted as relevant and with appropriate scientific foundation and, second, Plaintiffs had waived their objections to the challenged evidence by introducing it first. The 8th Circuit affirmed, finding that Plaintiffs' preemptive introduction of the simulations in their case-in-chief constituted a waiver of any claim of error to the simulations' admission. Accordingly, the 8th Circuit held that because the only argument in Plaintiffs' motion for new trial was based on the claim that the admission of the simulations was prejudicial error, Plaintiffs failed to show that the district court abused its discretion in denying their motion.

See photos from MDC past events:

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