THE DEFENSE LINE

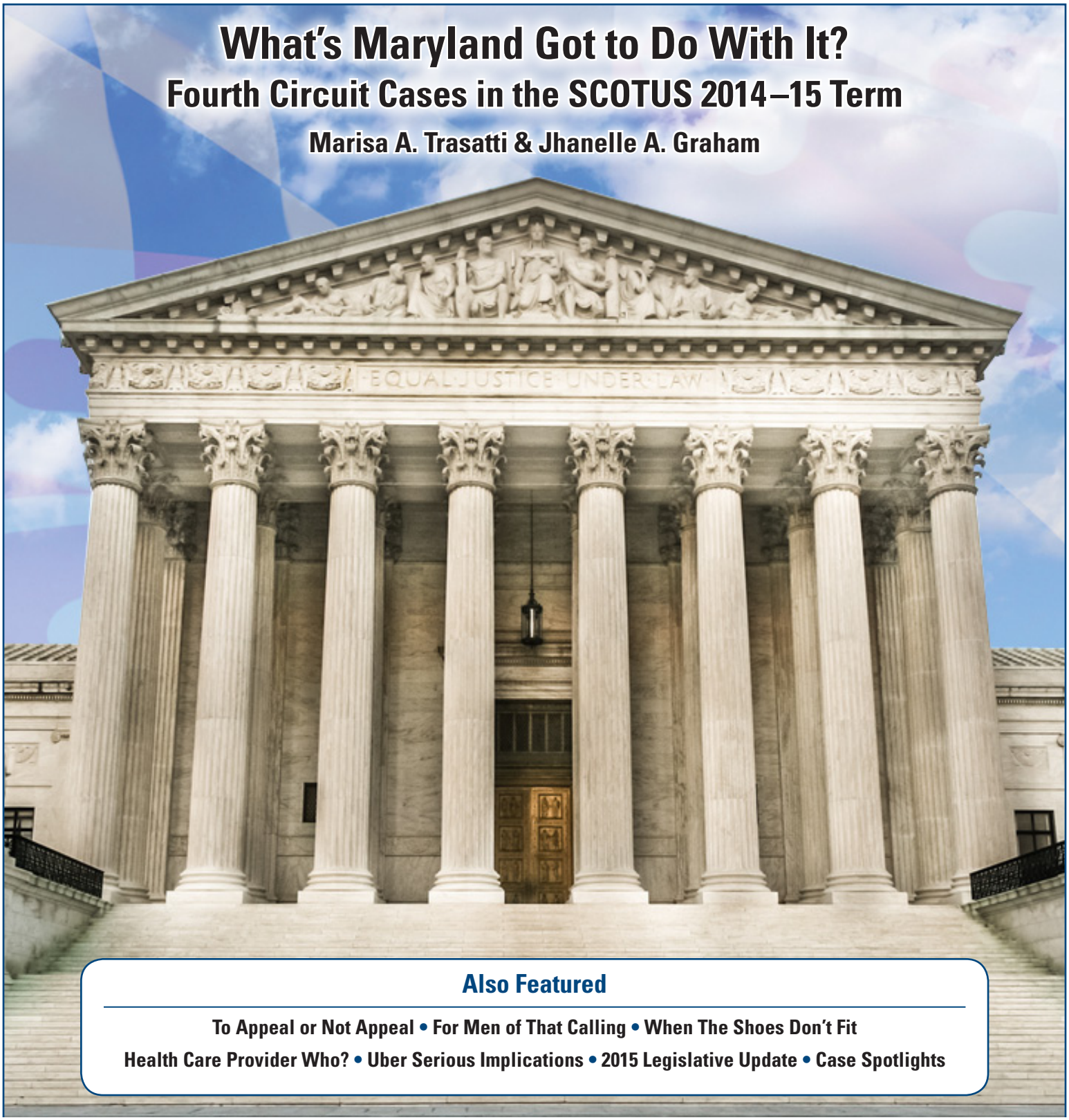
A Publication From The Maryland Defense Counsel, Inc.

Spring 2015

What's Maryland Got to Do With It?

Fourth Circuit Cases in the SCOTUS 2014–15 Term

Marisa A. Trasatti & Jhanelle A. Graham



Also Featured

Dear MDC Members

My year as MDC President is quickly coming to an end and I wanted to take this opportunity to thank the other Officers, President Elect Nikki Nesbitt, Secretary Chris Boucher and Treasurer Marisa Trasatti; immediate Past President, Toyja Kelly; the entire Board; and our Executive Director, Kathleen Shemer for all the hard work and commitment throughout this year to coordinate our efforts in Annapolis to support the defense communities interest, and in putting together amazing programs such as our annual Trial Academy. I wish Kathleen Shemer a Happy Twenty Fifth Anniversary as our Executive Director and thank her for her tireless efforts to keep the MDC running strong and growing!

Michael L. Dailey, Esquire
Schmidt, Dailey & O'Neill, LLC

This year's Trial Academy provided more interaction and practical trial experience for the attendees, as they participated in small group break-out sessions and had the opportunity to examine witnesses and receive immediate feed-back from experienced attorney coaches. I want to thank the Honorable Paul W. Grimm, Judge of the United States District Court for the District of Maryland Southern Division, for agreeing to be our Trial Academy Keynote Speaker. Judge Grimm provided insight and perspective on the challenges that face all trial attorneys in their efforts to rehabilitate witnesses. Thank you to Program Chairs Taren Stanton, Rachael Hirsch and Thomasina Poirot for putting together a challenging program that I believe will shape our future academies. This is a huge time commitment and you all did a great job. Also thank you Kathleen Shemer for coordinating the new location this year at University of Baltimore Business Center (and then getting a second date when our original date got canceled due to snow!).

I am proud of the efforts made by our substantive law committees to expand their rolls and participation, and we welcome the addition of a new subcommittee, lead paint, chaired by Susan Smith and Lisa Morgan. I hope that all who practice in the lead paint arena contact Susan and Lisa and join the committee and share ideas and practice notes that will help each of you in your practice. This is also a good time to remind all of our members and committee chairs to think about what they can do to expand their committee's activities and recommend that if you have not already implemented regular committee meetings, you start doing so now and please contact me with any help you need to get started.

Finally, I want to extend our thanks and gratitude to all of our members who represented the defense bar's interests before the Maryland legislature this session, including Nikki Nesbitt, Chris Boucher, Gardner Duvall, Ileen Ticer and our lobbyist, John Stierhoff. I also want to thank John's Paralegal, Angel Lavin, who kept us all informed of any bills that affect the defense community and Angel did an amazing job again in coordinating this year's successful legislative dinner.

Congratulations to our Immediate Past President, Toyja Kelly, who was elected as DRI's Secretary Treasurer for 2015. Please join DRI at the Annual Meeting as it returns to Washington, DC this year. The DRI Annual Meeting will take place October 7–11, 2015, at the Marriott Wardman Park in DC and for anyone who has not had the opportunity to attend in the past, I strongly urge you to attend. It's a great way to meet defense attorneys from across the country who practice in your field, foster networking relationships, and attend excellent seminars presented by national speakers and leaders.

THE DEFENSE LINE

Spring 2015

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

Maryland Defense Counsel
1218 Broadway Road
Lutherville, MD 21093

Phone 410-560-3895
Fax 443-705-0217

E-mail:
kshemer@mddefensecounsel.org
www.mddefensecounsel.org

Cover Photo Collage:
Shutterstock.com

Featured Articles

Columns

What's Maryland Got to Do With It?
Fourth Circuit Cases in the SCOTUS 2014–15 Term

Marisa A. Trasatti and Jhanelle A. Graham

In its 2013–2014 term, the Supreme Court of the United States ("SCOTUS") addressed controversial topics such as campaign finance restrictions, racial discrimination, pro-life speech outside of abortion clinics, unions, legislative prayer, and the Patient Protection and Affordable Care Act ("ACA"). Notably, the Court issued unanimous decisions in a record forty-five (45) of seventy (70) cases, and only eleven (11) cases were decided by 5–4 plurality opinions (compared to twenty-three (23) 5–4 plurality opinions in the 2012–13 term). Of those 5-4 decisions, six (6) cases divided the Court along party lines (i.e., Justices Ginsburg, Breyer, Sotomayor, and Kagan ("liberals") against the votes of Chief Justice Roberts and Justices Scalia, Thomas, and Alito).[1]

The 2014–15 term promises to be equally exciting — the Court will hear cases involving free speech, voting rights, religious freedom, and prisoners' rights, in addition to possibly tackling yet another challenge to the ACA and same-sex marriage. So, what does Maryland have to do with the Court's 2014–15 term? Let us review four (4) cases arising out of the Fourth Circuit which were granted *certiorari* by the Supreme Court.

1) Pregnancy Discrimination Act — *Young v. United Parcel Service, Inc.*, 2011 WL 665321, D. Md. (Feb. 14, 2011); 707 F.3d 437 (4th Cir. 2013); 134 S.Ct. 2898 (2014).

In *Young v. United Parcel Service, Inc.*, the Supreme Court was asked to decide for the first time whether the Pregnancy Discrimination Act ("PDA") requires an employer to provide light duty to a pregnant employee. In *Young*, Plaintiff, Peggy Young, a pregnant United Postal Service ("UPS") delivery driver in Landover, Maryland, was instructed by her medical provider to not lift more than twenty (20) pounds while working. UPS's employee policy requires their employees to be able to lift up to seventy (70) pounds. Due to Young's inability to fulfill this work requirement, as well as the fact that she had used all her available family/medical leave, UPS instructed Young to take an extended, unpaid leave of absence, during which time she lost her medical insurance coverage. Young gave birth in April 2007 and resumed working at UPS thereafter.

Young sued UPS, alleging that she had been the victim of gender and disability discrimination under the Americans with Disabilities Act and the Pregnancy Discrimination Act. UPS moved for summary judgment and argued that Young could not show that UPS's decision was based on her pregnancy or that she was treated differently than a similarly-situated coworker. Furthermore, UPS argued that it had no obligation to offer Young accommodations under the Americans with Disabilities Act because Young's pregnancy did not constitute a "disability." The Maryland district court dismissed Young's claim, and the United States Court of Appeals for the Fourth Circuit affirmed.

In a 6–3 vote, the Supreme Court vacated and remanded the Fourth Circuit's decision. The opinion, authored by Justice Breyer on March 25, 2015, held that a plaintiff alleging a denial of an accommodation constitutes disparate treatment under the Pregnancy Discrimination Act may make a *prima facie* case by showing that she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others similar in their ability or inability to work. The employer may then seek to justify its refusal to accommodate the plaintiff by relying on "legitimate, nondiscriminatory" reasons for denying accommodation. According to the Supreme Court, the record showed that Young created a genuine dispute as to whether UPS provided more favorable treatment to at least some employees whose situations could not be reasonably distinguished from hers. Thus, the Fourth Circuit must now determine on remand whether Young also created a genuine issue of material fact as to the motive behind UPS' less favorable treatment of Young compared with other nonpregnant employees.

Justice Alito filed an opinion concurring in the judgment, Justice Scalia filed a dissenting opinion in which Justices Kennedy and Thomas joined, and Justice Kennedy filed a separate dissenting opinion.

2) Double Taxation — *Comptroller of Treasury of Maryland v. Wynne*, 431 Md. 147 (2013); 135 S.Ct. 425 (2014).

In 2015, the Supreme Court will decide whether the United States Constitution prohibits a State from taxing all the income of its residents — wherever earned — by mandating a credit for taxes paid on income earned in other States.[2] In *Comptroller of Treasury of Maryland v. Wynne*, Howard County, Maryland residents — Brian Wynne and his wife, Karen Wynne (collectively, "the Wynnes") — own stock in Maxim Healthcare Services, Inc. ("Maxim"), a company that provides healthcare services

Continued on page 7

[1] *See Abramski v. United States*, 134 S. Ct. 2259, 2267 (2014) (holding that a person who buys a gun on someone else's behalf while falsely claiming that it is for himself makes a material misrepresentation punishable under 18 U.S.C. § 922(a)(6)); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (holding that the regulations promulgated by the Department of Health and Human Services requiring employers to provide their female employees with no-cost access to contraception violate the Religious Freedom Restoration Act); *Hall v. Florida*, 134 S. Ct. 1986 (2014) (holding that Florida's threshold requirement, as interpreted by the Florida Supreme Court, that defendants show an I.Q. test score of 70 or below before being permitted to submit additional intellectual disability evidence, is unconstitutional); *Harris v. Quinn*, 134 S. Ct. 2618 (2014) (holding that the First Amendment prohibits the collection of an agency fee from the plaintiffs in this case, home health care providers who do not wish to join or support a union); *Town of Greece v. Galloway*, 572 U.S. __ (2014) (holding that the town's practice of opening its town board meetings with a prayer offered by members of the clergy does not violate the Establishment Clause); *McCutcheon v. FEC*, 572 U.S. ___ (2014) (holding that aggregate limits restricting how much money a donor may contribute to candidates for federal office, political parties, and political action committees are invalid under the First Amendment).

[2] Oral argument was held on November 12, 2014. *See* the transcript *available* at www.oyez.org/cases/2010-2019/2014/2014_13_485.

(SCOTUS) *Continued from page 5*

nationally. In 2006, Maxim filed income tax returns in thirty-nine (39) States and allocated a share of taxes paid to each shareholder. The Maryland State Comptroller of the Treasury claims that the Supreme Court has recognized a State's right to tax all of its residents' income, whether earned inside or outside of the State, even where the result is multiple taxation of the same income. To the contrary, the Wynnes argue that Maryland's tax scheme unduly burdens interstate commerce — and thereby violates the Commerce Clause — because it does not offset multiple taxation through a credit. The Maryland district court determined that Maryland's tax unduly restricts interstate commerce and thereby violates the Commerce Clause, and the Comptroller petitioned the Supreme Court successfully for a writ of *certiorari*.

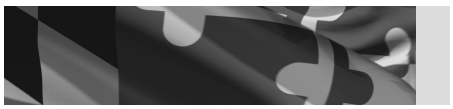
The Supreme Court's ruling will determine the constitutionality of so-called "double taxation"[3] in light of a State's sovereign power to tax its residents, as well as constitutional requirements against discriminatory tax schemes. Not only will this decision impact Maryland directly, but it will affect similar partial credit tax schemes nationwide, and may impact States' abilities to collect revenue in order to provide public services to residents. The Court's ruling will also address issues of State sovereignty and the extent to which a State must yield its sovereign authority to another.

3) Obamacare's Federal Exchanges — *King v. Burwell*, 997 F.Supp.2d 415 (E.D.Va. Feb. 18, 2014); 759 F. 3d 358 (4th Cir. 2014); 135 S.Ct. 475 (2014).

Another Fourth Circuit case before the Supreme Court in 2015 is *King v. Burwell*, which presents the issue of whether the Internal Revenue Service ("IRS") may authorize subsidies for individuals who purchased insurance through a federal exchange, as opposed to a State-operated exchange, under Section 1321 of the ACA. In *King*, the plaintiffs argued that the ACA specifically authorizes subsidies for individuals who purchase insurance through State-run exchanges but does not permit subsidies for individuals who purchase insurance through

Continued bottom of page 17

[3] "Double taxation" is a system in which an individual's income derived from economic activity in another State is taxed simultaneously by the individual's state of residency and the state in which it was earned.



Editor's Corner

The Editors are proud to publish this latest jamb-packed edition of *The Defense Line*, which features several interesting articles and case spotlights from our members. The lead article, submitted by **Marisa A. Trasatti** and **Jhanelle A. Graham** of Semmes, Bowen & Semmes, provides a review of the Supreme Court's decisions this year that affected Maryland. An article by **Al Scanlan**, **Bob Kelly** and **James Markels** of Jackson & Campbell P.C. offers advice on the timing of filing an appeal. **Jason R. Harris** and **Ellen G. Shults** of Welch and Harris, LLP provide insight on the new test being used in Salvage Cases. **Gerry Gaeng** and **James Crossan** of Rosenberg Martin Greenberg, LLP explain an exception to the general rule that an assignee "stands in the shoes" of his assignor. **John T. Sly**, of Waranch & Brown, LLC, provides some guidance on how to defend a medical malpractice action when the plaintiff fails to specifically name a negligent party. Next, **Rachel M. Severance** of Niles, Barton & Wilmer, LLP discusses some of the legal issues presented by the recent wave of new transportation options, like Uber, Lyft, and Sidecar. Finally, MDC Members, **Christopher Boucher**, **Michael L. Dailey**, **K. Nichole Nesbitt**, **Colleen K. O'Brien** and **John R. Stierhoff** summarize the various bills that were presented during the Maryland 2015 Legislative Session.

The Maryland Defense Counsel has had a number of successful events since the last edition of *The Defense Line*, including the always popular Past Presidents Reception and the 2015 Trial Academy. Mark your calendars now for the **Maryland Defense Counsel's Annual Crab Feast**, which will take place on **June 17, 2015**, at Nick's Fish House! 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.

Editor — Leianne S. McEvoy
Miles & Stockbridge P.C. • (410) 385-3823

Assistant Editor — Laurie Ann Garey
Progressive House Counsel • (410) 753-6494

Please Welcome MDC's New Members

Yodeski Acquie
Alexandra Adkins
John Archibald
Carrie V. Bohrer
Jeffrey W. Bredeck
Robert W. Burton
Brian Mitchell Cathell
Jessica D. Corace
Michael B. DeTroia
Dmitry Fishman
Andrew Gaudreau
Matthew D. Gimovsky
Nicole Harris-Crest
J. Teigen Hall
Jason A. Heller
Robert J. Hendricks
Victoria Heyliger
Marla Johnson
Katherine Lawler
John Maxa
Kristina L. Miller
Stacey Moffet
Lisa M. Morgan
Carlos Nieto
Jennifer Petty
Lauren A. Seldomridge
Susan Stobbart Shapiro
Ryan J. Sullivan
Gregg Viola

To Appeal or Not Appeal:
Recent Maryland Court of Appeals Decisions on When You Can Appeal

Alfred L. Scanlan, Jr., Robert N. Kelly and James N. Markels

This is the first of what the authors intend to be a series of Articles on the interfaces of Appellate and Trial Litigation tactics and practice. We begin with a recap and analysis of two rulings from the Maryland Court of Appeals that we believe will be of particular interest to the trial lawyer practicing in the areas of insurance and direct defense. Herein we will review those two cases and the light they shed on the seemingly simple question of when a party can appeal an unfavorable decision of the trial court.

It is commonly known that appeals must be taken from a final judgment—that is, from an order that has the effect of fully terminating litigation at the trial court level, and, in the words of the Court of Appeals, "putting a party out of court." Sometimes it can be difficult to determine when that has occurred. For example, when a trial court reviews an agency action and, upon a finding of error, remands the case back to the agency for further proceedings that is considered a "final judgment" for the purpose of an appeal. But what if the agency and the aggrieved party ask the trial court to remand the case without conducting a review, and the trial court does so? Is that order appealable? In an opinion released on March 30, 2015 in *Metro Maintenance Systems South, Inc. v. Milburn*, 2015 WL 1412639 (Md. 2015), the Court held it was not.

In that case, Milburn applied for unemployment benefits to the Department of Labor, Licensing, and Regulation (the "Department") after he quit his job. A Department examiner denied his application based on a finding that he did not quit his job "for good cause" under Labor & Employment Article § 8-1001(a)(1). He appealed to the Department's Lower Appeals Division, which affirmed the same finding, and then to the Department's Board of Appeals, which refused to hear his appeal. Milburn then appealed to the trial court.

As required under Maryland Rule 7-207, Milburn filed a brief with the trial court arguing for reversal of the Department's determination, and his former employer filed an opposition, arguing that it should be upheld. The Department, after reviewing the briefs, moved that the matter be remanded to the Department for further review of the examiner's findings. Milburn consented, but his former employer opposed the Department's motion. The trial court, after a hearing in which the merits of the case were not discussed, granted the Department's motion. The former employer appealed. The Court of Special Appeals determined that the trial court's order was not appealable and dismissed the appeal. The case then appeared on the Court of Appeals' radar.

The Court of Appeals began by reminding us that a ruling must contain three elements to be an appealable final judgment: (1) it must be intended by the court as an unqualified, final disposition of the matter in controversy; (2) unless the court acts pursuant to Maryland Rule 2-602(b) to direct the entry of a final judgment as to less than all the claims or all the parties, it must adjudicate or complete the adjudication of all claims against all parties; and (3) it must be set forth a recorded in accordance with Rule 2-601. *Milburn* (*citing*, *Rohrbeck v Rohrbeck*, 318 Md. 28, 41, 566 A.2d 767 (1989)).

Only the first element was in question in *Milburn*. Under that prong, the Court made it clear that an order that "terminates the proceedings in that court and denies a party the ability to further prosecute or defend the party's rights concerning the subject matter of the proceeding" is a final judgment even if the order did not resolve the merits of the case itself. A typical example of such an order is one that transfers venue of a case from one trial court to another. The Court noted that in agency appeals, a typical result is for the case to be remanded to the agency for further proceedings. While the rights of the parties may yet be fully determined upon remand, those remand orders are final judgments because they terminate the proceeding before the trial court.

Given that background, the Court concluded that the trial court's work was not yet "done" as a result of the remand prior to a review of the merits, because it had merely deferred its review for the time being. The Court distinguished this case from the cases involving a transfer of venue since the trial court was still in place to receive the case again from the Department if necessary. As a result, the former employer had not been "put out of court" as needed for there to be a final appealable judgment.

Aside from final judgments, certain categories of interlocutory orders of the trial court are immediately appealable pursuant to MD Code, Courts and Judicial Proceedings, § 12-303. In addition, at common law certain interlocutory orders can be appealed under what is called the collateral order doctrine. This doctrine is a very narrow exception to the final judgment rule, and is applicable only under extraordinary circumstances. The criteria that must be met to fit within this doctrine are that the order must: (1) conclusively determine a disputed question; (2) resolve an important issue; (3) be completely separate from the merits of the action; and (4) be effectively unreviewable on appeal from a final judgment. A classic example is a party's challenge to a trial court jurisdiction based on an arbitration agreement—the party's appeal rights are effectively lost if a trial court's denial of a motion to compel arbitration cannot be appealed until after the conclusion of the jury trial itself.

In *Spivery-Jones v. Receivership Estate of Trans Healthcare, Inc.*, 438 Md. 330, 91 A.3d 1172 (2014), the Court considered whether an order denying a motion to vacate a receivership was appealable under the collateral order doctrine. In that case, approximately two years after a trial court appointed a receiver for an insolvent company, a creditor of that company moved to vacate that receivership on the basis that the trial court lacked subject matter jurisdiction. The plaintiff-appellant argued that the assets of the receivership would be looted through distributions to other creditors, as well as the expenditure of administrative and legal fees, before any meaningful review of her contention could occur.

After losing before the trial court and the Court of Special Appeals, the appellant pressed her case on to the Court of Appeals, but to no avail. The Court took little time in distinguishing her appeal from the receivership appointment orders permit-

Continued bottom of page 19

For Men of That Calling:
A Newly Articulated Test in Salvage Cases[1]

Jason R. Harris and Ellen G. Shults

For those evaluating or litigating salvage claims, gauging the value of the services rendered may involve the dry-heeled-desk-jockey occasionally putting his or herself in the "Sneads Ferry Sneakers" (eastern North Carolina vernacular for shin-high muck-wader shoes) of those tending to the dilemma at sea. Lending strength to the test of at least one other court, the Eleventh Circuit Court of Appeals has very recently determined that when evaluating the risks faced by professional salvors, it will consider those risks ordinary "for men of that calling" as opposed to the risks someone other than a professional salvor might undertake. While salvors may proclaim little value to the decision since apparently a "professional uplift" was not necessarily rejected by the decision, the new holding seems generally favorable to the defense bar and insurance industry. *Arnaud Girard v. M/Y Quality Time*, No. 14-10931 (11th Cir. Jan. 6, 2015).

In a rare United States Court of Appeals decision involving the application of salvage law, the Eleventh Circuit Court of Appeals affirmed the district court for the Southern District of Florida's award of $16,896.05 (12% of the vessel's post-casualty value) to Arnaud Girard, a professional salvor, in connection with the salvage of the M/Y Quality Time following its grounding off the coast of Key West in 2012. Mr. Girard, appearing *pro se*, made three arguments on appeal: (1) the district court's conclusions of law were inconsistent with its factual findings; (2) the district court applied the incorrect law; and (3) in light of public policy, he should have been awarded 33% of the vessel's post-casualty value.

Rejecting Mr. Girard's argument that the district court's conclusions of law were inconsistent with its factual findings, the Eleventh Circuit, applying the Blackwall factors, found that a low-level salvage award was appropriate because Mr. Girard's efforts were limited to routine salvage services typical of a professional salvor such as pumping or dewatering the vessel, patching the hull, and towing the vessel to the boatyard. The court noted that the seas were "moderate" and the weather was relatively calm at the time of the operation. The Court of Appeals further noted that in making the award, the district court had considered the risks Girard took during the nighttime dive to repair the vessel's hull and Girard's promptness and effectiveness in completing the salvage. In light of the district court's application of the Blackwall factors to the factual findings, the Court of Appeals found no inconsistencies between the court's findings and its conclusions.

Turning to Mr. Girard's contention that the district court erroneously applied the fourth Blackwall factor when it found that he was not entitled to a liberal award because he did not face risks out of the ordinary for a professional salvor, the Court of Appeals noted that the appropriate standard to apply when evaluating whether to liberally reward the salvor is whether the salvor took risks out of the ordinary "for men of that calling," the typical professional salvor — as opposed to the risks that an ordinary person would take, adopting a standard earlier espoused by the Second Circuit Court of Appeals in *B.V. Bureau Wijsmuller v. United States*, 702 F.2d 333 (2d Cir. 1983). Therefore, the Court of Appeals held that the district court did not err in its application of the fourth Blackwall factor and had appropriately made a low-level salvage award.

The Court of Appeals similarly dismissed Mr. Girard's argument that the lower court should have awarded him 33% of the Quality Time's post-casualty value as a means to incentivize salvors. In support of his contentions, Mr. Girard cited cases in which he claimed the salvage award was not less than 33% of the ship's value. The Court of Appeals disputed Girard's characterization of the cited cases, but found "in any event" that "fixed percentages of value and comparisons to percentage from previous awards should play no role in the salvage award" and concluded by affirming the district court's salvage award.

Mr. Harris is a partner with Welch and Harris, LLP. in Jacksonville, North Carolina, conveniently located between the Ports of Wilmington and Morehead City. He concentrates on civil litigation, including maritime and admiralty law; he is frequently called upon to assist with cases and investigations involving the intersection of maritime and criminal law. Mr. Harris is a Proctor member of the Maritime Law Association and serves as the Chairman of the Salvage Committee. Mr. Harris is a member of the adjunct faculty at Campbell University's Law School and UNCW. Mr. Harris earned his B.A. from Auburn University in 1997, his J.D. from Wake Forest University in 2000, his LL.M. in Ocean and Coastal Law from The University of Miami in 2001 and he was Honorably Discharged from the Army National Guard in 2000.

Ellen earned her J.D., cum laude, in 2005 from the University of Alabama School of Law, where she served as managing editor of the Alabama Law Review. While in law school, Ellen received several honors including the Book Award in Civil Procedure. Ellen received a B.A., summa cum laude, in Political Science from Auburn University in 2002. Prior to becoming an associate, Ellen worked in private practice in California and Alabama. Ellen is a member of the North Carolina State Bar, the Alabama State Bar and the District of Columbia Bar.

[1] Originally published in the International Association of Marine Investigators, Inc., Newsletter, January–March 2015.

When The Shoes Don't Fit:
The Maryland Court of Appeals Limits Assignee Liability of A Loan Purchaser For Statutory Violations Committed By The Lender at Closing

Gerry Gaeng and James Crossan

It has often been said that an assignee "stands in the shoes" of his assignor. This popular imagery is used to argue that an assignee is responsible under Maryland common law for the actions of its assignor. However, in a recent case in which RMG (Rosenberg Martin Greenberg, LLP) attorneys were involved, the Maryland Court of Appeals rejected borrowers' claims that they could sue the assignee of a paid-off mortgage loan for violations of Maryland's Secondary Mortgage Loan Law (SMLL)[1] that were allegedly committed by the lender at the loan closing.

The SMLL strictly regulates the making of certain second-mortgage loans. Like a number of Maryland lending laws, it provides that a lender who violates the act is limited to collecting only the principal amount of the loan and is not entitled to collect any interest or other charges. If the violation is "knowing," the borrower can recover a form of treble damages.

In *Thompkins v. Mountaineer Investment, LLC*,[2] the plaintiffs alleged that the lender on their second-mortgage loan charged closing fees in excess of those permitted under the SMLL. After the loan was paid off, the borrowers sued both the originating lender and the assignee who had purchased the loan. Plaintiffs sought statutory penalties for the lender's violations, including the forfeiture of all interest and fees collected during the life of the loan. The trial court rejected the plaintiffs' contention that the assignee could be liable under these circumstances, and Maryland's highest court agreed.[3]

The Court of Appeals recognized at the outset that the terms of the SMLL, unlike some other lending statutes, do not purport to create assignee liability for closing costs collected by the assignor lender.

The Court next rejected plaintiffs' theory that the Uniform Commercial Code (UCC) provisions governing negotiable instruments create assignee liability under these circumstances. While Maryland UCC Section 3-305 creates a claim of recoupment in favor of a borrower against an assignee who has knowledge of the assignor's wrongs, the claim of recoupment against the assignee is limited to reducing amounts still owing on the instrument at the time the claim is brought. In *Thompkins*, the loan was paid off before the suit was filed, so there could be no claim in recoupment under UCC Section 3-305.

Finally, the Court of Appeals rejected plaintiffs' argument that under the common law of Maryland, an assignee "stands in the shoes" of its assignor and is always subject to claims that could be raised by the borrower against the lender. The Court held that there is no basis to conclude that an assignment of a second-mortgage loan necessarily or presumptively involves the assignment of the original lender's liability for violations of the SMLL. Because the assignee did not expressly assume the original lender's liability, the assignee could not be derivatively liable under the common law for a violation of the SMLL by the lender.

RMG's Gerry Gaeng and Andy Baida were the principal drafters in *Thompkin*s of the Brief of Amici Curiae filed in the Court of Appeals on behalf of the Maryland Bankers Association and a group of national and regional financial institutions arguing against plaintiffs' theories of assignee liability. Gerry was also a lead defense counsel in a group of prior consolidated federal cases in which the federal court reached the same conclusion about assignee liability as the Maryland Court of Appeals reached in *Thompkins*.[4]

Gerard J. Gaeng is the Chair of the Litigation Group at Rosenberg Martin Greenberg, LLP, and has handled successfully some of the region's largest and most complex litigation matters, in both state and federal trial and appellate courts. He concentrates in complex business and government litigation, including class-action defense, financial institution litigation, administrative law, higher education law, and real estate and construction litigation.

James E. Crossan is a business lawyer and general civil litigator at Rosenberg Martin Greenberg, LLP who works directly with individual and corporate clients in a wide range of commercial transactions including banking and finance, automotive sales, event planning, commercial property leases, equipment leases, electricity and natural gas supply agreements, title insurance coverage, real estate development and construction contracts.

[1] Md. Code Ann., Comm Law § 12-401, *et seq.*

[2] *Thompkins v. Mountaineer Investments, LLC*, 439 Md. 118, 94 A.3d 61 (2014).

[3] Plaintiffs voluntarily dismissed the original lender, who had gone bankrupt prior to the filing of the complaint.

[4] *Fulmore v. Premier Financial Corp.*, 2010 WL 4286362 (D.Md., Oct. 29, 2010).

Health Care Provider Who?

John T. Sly

Imagine you are representing a large hospital or medical practice and the plaintiff's lawyer suing for malpractice names the hospital or practice — without saying who specifically breached the standard of care. How can you defend someone that plaintiff has failed to identify?

It is not hard to imagine that 25 or more health care providers from different fields of medicine might care for a complicated hospitalized patient. Even in a private practice with multiple physicians, nurses and physician assistants, one can see how a patient might be treated by a number of health care professionals over the course of an illness. When a plaintiff's lawyer names only the hospital or the practice, the defense is left in the dark as to who was allegedly negligent. From experience, the plaintiff's failure to name a specific health care provider as having committed negligence is due either to the inability of the plaintiff's lawyer to identify the allegedly negligent person by name, or is evidence of an intentional strategy to proceed through discovery, and maybe even trial, without having to narrow down the target. Either way, the defense must ferret-out precisely who plaintiff claims breached the standard of care. The good news is that Maryland law can help.

In order to maintain a medical malpractice claim, a plaintiff must meet the requisite statutory requirements of the Health Care Malpractice Claims Act, set forth in the Courts and Judicial Proceedings Article of the Maryland Code, section 3-2A-01, et. seq., ("the Malpractice Claims Act"). The first such requirement of the Malpractice Claims Act is that "claims against health care providers, first, be submitted to arbitration..." *Walzer v. Osborne*, 395 Md. 563, 575, n. 7, 911 A.2d 427, 433 (2006) (citing CJP § 3-2A-02(a)). The second is the filing of a certificate of a qualified expert and an accompanying report, both of which must comply with various statutory requirements. The filing of the certificate and report is not just a procedural mechanism by which jurisdiction in the circuit court is obtained; rather, it is an "indispensable step" in the medical malpractice process and a condition precedent to obtaining subject matter jurisdiction in the Circuit Court. *Walzer*, 395 Md. at 582. Because the filing of a certificate is an "indispensable step in the [HCADRO] arbitration process," a plaintiff can only pursue a claim in circuit court after filing a certificate and report that meet the statutory requirements enunciated in *Walzer* and its progeny. *Id.* at 577.

A certificate and report that contain only general statements alleging that a defendant health care provider breached the standard of care is not sufficient. *Carroll v. Konits*, 400 Md. 167, 172, 929 A.2d 19, 22 (2007). Rather, the certificate must include, at a minimum, a statement that the defendant's conduct breached a particularized and defined standard of care, and that such a departure from the standard of care was the proximate cause of the plaintiffs' injuries. *Id.* Maryland courts consistently hold that if a plaintiff fails to file a satisfactory certificate of qualified expert and accompanying report, his case shall be dismissed without prejudice. *Id.* A report that fails to define the standard of care and provide, with specificity, how the health care provider breached the standard of care must be stricken. *Carroll*, 400 Md. at 197-98 (upholding the trial court's dismissal of the plaintiff's case on the basis that the certificate of qualified expert and report failed to explain the requisite standard of care owed to the plaintiff or how the defendant's care departed from it).

In addition to meeting the substantive report requirements, the expert witness who provides the plaintiff with a certificate of qualified expert and report must be board certified in the same or similar field as the health care provider about whom he is testifying, unless certain exceptions apply. CJP § 3-2A-02 (c)(2). This is also true for any health care provider who intends to testify at trial on the standard of care.

The Court of Appeals addressed the issue of identifying the actual alleged tortfeasor in a series of important cases. The Court found that inherent in the certificate of qualified expert and report requirements is the threshold mandate "…that the certificate mention explicitly the name of the licensed professional who allegedly breached the standard of care." *See Carroll*, 400 Md. at 196; *Witte*, 369 Md. at 521; *Kearney v. Berger*, 416 Md. 628, 648 (2010). Indeed, the purpose of the Statute is to "weed out non-meritorious claims." *Kearney*, 416 Md. at 645 (citing *Carroll*, 400 Md. at 196). A certificate which fails to specifically identify each physician who has breached the standard fails to satisfy this purpose, and is of no assistance to "'…the opposing party, the [Health Care Arbitration and Dispute Resolution Office], and the courts [in] evaluat[ing] whether a … particular physician out of several … breached the standard of care.'" *Id.* (quoting *Carroll*, 400 Md. at 196).

Thereafter, the Court of Special Appeals referenced this issue in *Puppolo v. Adventist Healthcare, Inc.*, 215 Md. App. 517 (2013). One of the primary holdings of *Puppolo* is that if a plaintiff fails to meet the statutory requirements of a certificate and report, the plaintiff must start again in HCADRO. In other words, the plaintiff cannot cure the defect in Circuit Court. *Id.* at 229-232. Often lost in the opinion by Judge Zarnoch, however, is that the circuit court below had dismissed Adventist Healthcare ("Adventist") without prejudice because the court determined that Puppolo's certificate did not specifically identify the licensed professionals at Adventist whom she alleged breached the standard of care. *Id.* at 524. The *Puppolo* Court not only referred to the circuit court ruling, it specifically referenced the statutory provision it believed controlled this issue.

Continued on page 17

Expert Information Inquiries

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

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

(HEALTH CARE PROVIDER WHO?) *Continued from page 15*

The Court noted that

> Read literally and as a response to Walzer, CJP § 5–119 appears to apply only to a failure to file a proper *expert's report* under CJP § 3–2A–04(b)(3), rather than the failure to file a sufficient *certificate of qualified expert* under § 3–2A–04(b)(1). **The January 28, 2011 dismissal of Puppolo's claim against Adventist for failure to sufficiently identify the responsible providers in the certificate seems to smack more of a deficiency under § 3–2A–04(b)(1), rather than a failure to comply with § 3–2A–04(b)(3).** (emphasis added)

Puppolo, 215 Md. App. at 529.

The foregoing statements of both the Court of Appeals and Court of Special Appeals make clear that plaintiff's failure in their certificate of qualified expert and report to specifically identify by name a human health care provider who is alleged to have breached the standard of care requires dismissal of the case without prejudice. The upshot of this analysis is that the failure to name a putatively negligent health care provider should prompt the defense to move to strike the certificate of qualified expert and report. Plaintiff must then refile their case in HCADRO with an appropriate certificate and report. Only then can the defense properly prepare to address the allegations against a particular health care provider.

Maryland law has developed through both statutory modifications and important case law in the area of what is required to be contained in the certificate of qualified expert and report. It is important that we as the defense bar aggressively seek to apply the appropriate rules so as to "weed out non meritorious claims." *Kearney v. Berger*, 416 Md. 628, 645 (citing *Carroll*, 400 Md. at 196.)

John T. Sly is a trial attorney and partner at Waranch & Brown, LLC. His practice focuses on the aggressive defense of physicians and health care facilities, and product manufacturers and retailers throughout Maryland. Since becoming a trial attorney he has served on the Executive Board of the Maryland Defense Counsel and is actively involved with ABOTA, the Maryland State Bar Association, the Defense Research Institute and the MD-DC Society for Healthcare Risk Management.

(SCOTUS) *Continued from page 7*

federal exchanges. As of December 2014, thirteen (13) States (including Maryland)[4] and the District of Columbia have State-operated exchanges, while the remaining States either have federally-operated exchanges or exchanges in partnership with the federal government.

On the same day that the Fourth Circuit decided *King* in favor of the IRS, a federal appellate court in Washington, D.C. decided *Halbig v. Burwell* to the contrary, holding that the relevant text of the Internal Revenue Code unambiguously restricts subsidies to insurance bought on an exchange "established by the State." *Halbig* was one (1) of several cases across the country disputing the IRS's interpretation of the ACA. In light of the Fourth Circuit's ruling in *King*, the *Halbig* court granted the government's request for a rehearing *en banc*. The plaintiffs in *King* petitioned the Supreme Court for *certiorari*, and the Supreme Court is expected to issue its decision by June 2015.

4) Fed. R. Civ. P. 4(m) — *Chen v. Mayor and City Council of Baltimore*, 292 F.R.D. 288 (D.Md. Feb. 22, 2013); 546 Fed.Appx. 187 (4th Cir. Nov. 12, 2013); 135 S.Ct. 475 (2014).

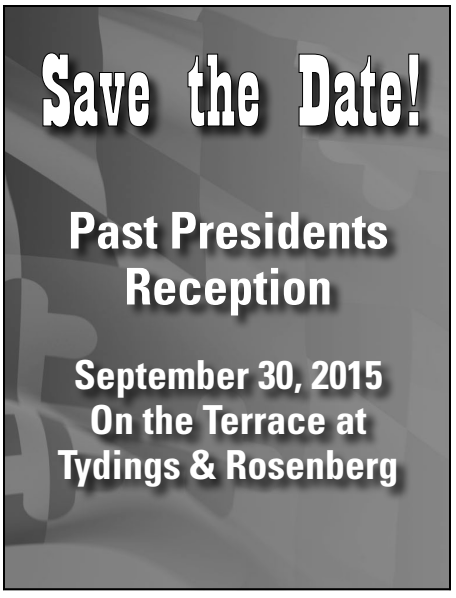
In *Chen v. Mayor and City Council of Baltimore, Maryland*, the Supreme Court granted *certiorari* to decide whether, under Federal Rule of Civil Procedure 4(m), a district court has discretion to extend the time for service of process absent a showing of good cause, as the Second, Third, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits have held, or whether the district court lacks such discretion, as the Fourth Circuit has held. In *Chen*, the plaintiff, Bobby Chen, was the owner of a residential property that was damaged when the city of Baltimore and the city's contractor, P & J Contracting Company, were in the process of razing the adjacent rowhouse. Chen sued the city and contractor in 2009, alleging that the defendants razed Chen's property on the pretext that it was an unsafe structure instead of repairing the damage they had caused. The district court dismissed the case due to Chen's failure to meet various procedural deadlines. Chen filed a second action in 2011, but when the clerk of the court issued summonses, they were returned as undeliverable and the 120-day limit for the period of service lapsed. The court issued an order requiring Chen to show cause to justify the non-dismissal of his case, and Chen sought an extension of time to effect service of process. The Maryland district court granted Chen a further 60-day extension, and he was warned that failure to effect service of process during this time would result in dismissal. The 60-day period expired and the defendants moved for dismissal, which the trial court granted. The U.S. Court of Appeals for the Fourth Circuit affirmed the lower court's dismissal, and the Supreme Court granted *certiorari* in July 2014.

Chen's procedural failures did not end at the Fourth Circuit. The Justices were unable to decide the case on the merits because Chen failed to file a brief within forty-five (45) days of the order granting review, did not request an extension of time, and did not respond to correspondence sent to him. Consequently, the Supreme Court dismissed the case.

With one dismissal and one reversal of these Fourth Circuit cases, we eagerly await the Court's decisions of the remaining impactful actions.

Marisa A. Trasatti is a partner at Semmes, Bowen & Semmes in Baltimore, Maryland. Her practice focuses primarily on civil litigation, with an emphasis on products liability litigation.

Jhanelle Graham is an associate at Semmes, Bowen & Semmes.



[4] The thirteen (13) States (along with the District of Columbia) that have State-operated exchanges in place are California, Colorado, Connecticut, Hawaii, Idaho, Kentucky, Maryland, Massachusetts, Minnesota, New York, Rhode Island, Vermont, and Washington.

Uber Serious Implications:
How a Smartphone App is Driving the Conversation on Worker Classification

Rachel M. Severance

After their six-year-old daughter was killed by an Uber driver on New Year's Eve, a San Francisco family filed a wrongful death lawsuit against both the driver and Uber itself, the owner of the increasingly popular smartphone app. The lawsuit alleges that Uber (and similar companies such as Lyft or Sidecar) runs afoul of California's law prohibiting distracted driving because Uber requires drivers to "respond quickly to a user request for service by interfacing with the app." Kale Williams & Kurtis Alexander, *Uber Sued Over Girl's Death*, SFGATE (Jan. 28, 2014, 12:42 PM), www.sfgate.com/bayarea/article/Uber-sued-over-girl-s-death-in-S-F-5178921.php. Although Uber, Lyft, and Sidecar have been sued for personal injury damages before, this is the first case involving wrongful death and major damages.

This lawsuit highlights many legal issues for these types of transportation companies that rely on a network of apps, particularly with regard to the employment status of the drivers. The obvious issue is whether Uber drivers are employees or independent contractors. Uber drivers are required to carry their own insurance, but is Uber vicariously liable for the negligent actions of its drivers? Unsurprisingly, Uber contends that its drivers are independent contractors, and it maintains that it is not vicariously liable for any driver's negligent acts. Companies such as Uber claim that they are merely tech companies, which take a fee for putting passengers and drivers together, and therefore, the drivers are independent contractors. However, if the driver is determined to be an employee, the company is opened up to vicarious liability, taking on the responsibility for the negligence of its employee. Some Uber drivers disagree with Uber's stance in this regard. Some drivers have even filed a putative class action in the United States District Court for the Northern District of California, alleging that they have been misclassified as independent contracts when they are actually employees. *O'Connor, et al. v. Uber Technologies, Inc., et al.*, C-13-3826 EMC (D. Cal. filed August 16, 2013).

Although ride-sharing apps are new, parallels can be drawn in the way the law treats taxi and delivery drivers. For example, taxi drivers often lease their vehicles and display some form of "taxi leased to driver" language on the cab. The drivers and the taxi companies consider the drivers to be independent contractors. However, in the event of an accident, the plaintiff will most likely sue the driver and the cab company. Despite an assertion that the driver is an independent contractor, the plaintiff may very well prevail against the cab company depending upon the facts. Uber, Lyft, and Sidecar have continuously fought any parallel characterizations to traditional taxi companies and we fully expect them to continue to push this distinction. *See, e.g. C & H Taxi Co. v. Richardson*, 461 S.E.2d 442 (W. Va. 1995); *Pikaart v. A & A Taxi, Inc.*, 713 S.E.2d 267 (S.C. 2011); *Lopez v. El Palmar Taxi, Inc.*, 676 S.E.2d 460 (Ga. Ct. App. 2009); *Blue & White Taxi v. Carlson*, 496 N.W.2d 826 (Minn. Ct. App. 1993).

In 2013, a Texas jury awarded $32 million in damages resulting from a fatal car accident against a pizza delivery driver and the independent franchise store that sold the pizza. The jury found Domino's Pizza vicariously liable, partly because the driver alleged that he was speeding in order to meet Domino's 30-minute delivery policy at the time of the accident. Domino's Pizza is appealing the verdict.

The characterization of independent contractor versus employee is not a new issue in the law and it spans a variety of legal cases. As employment law disputes reveal, workers that employers characterize as independent contractors may nevertheless be characterized as employees in the eyes of the court. Uber, Lyft, and Sidecar are new companies and it is too soon to say how the liabilities will be assigned. However, it is inevitable that accidents will occur and this issue will need to be resolved. Cases involving the liability of these companies will provide a chance for legal professionals to test the limits of liability while still applying established principles and laws.

Rachel M. Severance is an Associate in the Litigation Department of Niles, Barton & Wilmer, LLP. She concentrates her practice in the areas of civil and commercial litigation, insurance coverage and property insurance law, subrogation, and employment law in the state of Maryland. She is a member of the ABA, MSBA's Labor & Employment Law Section, Litigation Section and Young Lawyers Section, Bar Association of Baltimore City and DRI. Ms. Severance serves on the Board of Directors of the Eubie Blake National Jazz Institute and Cultural Center in Baltimore.

(TO APPEAL OR NOT APPEAL) *Continued from page 9*

ted under Section 12-303(3)(iv), since the order appealed from denied a request to vacate an appointment, as opposed to grant an appointment. The appellant was two years late in filing her appeal on that issue. As to the collateral order doctrine, the Court held that the appellant did not meet the extremely high standard required. The Court noted that she could still challenge any distribution plan offered by the receiver before the trial court, and those decisions could be appealed. That this process may entail further litigation costs was of no moment. Since the issue raised by the appellant was still reviewable, she had no ability to appeal.

These cases highlight the careful attention that a litigator must use in determining when to appeal an unfavorable ruling. While in these cases the litigants were found to have appealed prematurely, counsel must be equally careful to note a timely appeal when a final judgment has been entered, or else lose that right permanently. For example, when a motion for sanctions comes into play at the conclusion of litigation, the time for appealing a final judgment on the merits is decidedly not co-terminus with the time to appeal the grant or denial of attorneys fees and or other sanctions under Rule 1-341. The former is a final order, the latter collateral. Vigilance, and awareness of the standards for determining the appealability of orders, are mandatory for the prudent litigator.

Alfred L. Scanlan, Jr., Robert N. Kelly and James N. Markels anchor the Appellate and Trial Strategy Group within Jackson & Campbell, P.C., and concentrate on assisting clients and their existing legal counsel develop effective trial and dispute resolution strategies at the trial court level, and assuming direct responsibility for appeals to state and federal appellate courts.

Maryland General Assembly Wraps Up 2015 Legislative Session

Christopher Boucher, Michael L. Dailey, K. Nichole Nesbitt, Colleen K. O'Brien, and John R. Stierhoff





The following summarizes certain legislation passed or defeated in the Maryland General Assembly, which bear relevance to the practice of civil law in the State of Maryland.

Task Force to Study the Establishment of Health Courts (Failed)

Unsuccessful House Bill 402 ("HB 402") and Senate Bill 188 ("SB 188") proposed the establishment of a Task Force to Study the Establishment of Health Courts, and ultimately received an unfavorable report from the House Judiciary Committee on March 18, 2015 and from the Senate Judicial Proceedings Committee on March 20, 2015. HB 402/SB 188 sought to establish a task force that would investigate the adequacy and cost of state law and policies relating to the litigation of medical malpractice cases in the State of Maryland. In particular, the task force would examine the feasibility of assigning a medical malpractice case to a single judge throughout the litigation process. The task force would also evaluate whether specialized litigation tracks, similar to currently used in the Maryland Business and Technology Case Management Program, should be utilized to ensure that motions and other matters are ruled upon timely and consistently. The Maryland Defense Counsel ("MDC") supported these bills with written and oral testimony. HB 402 was defeated with vote of 16 to 4 in the House Judiciary Committee and SB 188 was defeated with a vote of 10 to 0 in the Senate Judicial Proceedings Committee.

Civil Action — Wrongful Selling or Furnishing of Alcoholic Beverages (Failed)

Unsuccessful Senate Bill 93 ("SB 93") and House Bill 102 ("HB 102"), sought to impose "Dram Shop Liability" in Maryland. This legislation was authored to permit civil actions against alcoholic beverage licensees for damages proximately caused by a customer who purchased an alcoholic beverage from the licensee. The bills imposed liability upon the licensee if (a) the licensee knew or reasonably knew that the customer "was visibly under the influence" of alcohol; (b) the licensee could have reasonably foreseen that the customer might attempt to drive a motor vehicle; and (c) the customer's negligence while driving under the influence proximately caused the damages claimed by the plaintiff. The bills did not provide the customer with a private cause of action, only other persons that the customer injured while trying to drive under the influence. Under the current state of Maryland law, a beverage licensee can be subject to a misdemeanor conviction, imprisonment, and a fine for serving a customer who causes another injury; it does not, however, provide for a private cause of action.

The MDC submitted opposition testimony to the Senate Judicial Proceedings Committee regarding SB 93 and to the House Judiciary Committee regarding HB 102. The MDC took issue with various ambiguities in the text of the law, including the amorphous standard that the licensee know that the customer is/was "visibly under the influence" of alcohol. SB 93 received an unfavorable report from the Judicial Proceedings Committee on February 25, 2015 with a 10 to 1 vote. The cross-filed bill, HB 102, was subsequently withdrawn.

Health Care Malpractice — Certificate and Report of Qualified Expert — Objection (Failed)

Unsuccessful Senate Bill 127 ("SB 127") sought to allow a medical malpractice plaintiff to re-file a certificate of a qualified expert or report if the plaintiff's previous certificate was held to be insufficient under the law. Under current Maryland law, a plaintiff seeking more than $30,000 in a medical malpractice action is required to file a certificate of qualified expert that attests that (1) the defendant health care provider breached the applicable standard of care and (2) the departure from the standard of care was the proximate cause of the alleged injury. A substantively inadequate certificate of a qualified expert is tantamount to not having filed a certificate at all. Pursuant to SB 127, any objection to the sufficiency of a certificate of a qualified expert or report must be filed within 14 days after the filing of the certificate or report. If a party's certificate or report is legally insufficient, the party may file a legally sufficient certificate and report of an attesting expert within 30 days of the order's entry.

A prior iteration of SB 127 was introduced in 2011 as House Bill 340 ("HB 340") and Senate Bill ("SB 887"). HB 340 was heard and voted Unfavorable by the House Judiciary Committee, and SB 887 was withdrawn without a hearing in the Senate Judicial Proceedings Committee.

The MDC submitted testimony to the Judicial Proceedings Committee in opposition to SB 127 arguing that medical malpractice defense attorneys regularly have issues with plaintiffs filing generic, non-substantive certificates by unqualified experts that shed no light on the actual standard of care violations and causation issues that ultimately will be asserted. The

MDC further argued that the current statutory framework already permits an automatic 90-day extension to file certificates if failure to file on time would result in a violation of the statute of limitations. In a 9 to 2 vote, SB 127 received an unfavorable report from the Senate Judicial Proceedings Committee on February 23, 2015.

Civil Jury Trials — Amount in Controversy (Failed)

Unsuccessful Senate Bill 474 ("SB 474") proposed an amendment to Article 23 of the Maryland Constitution, which currently preserves the right to a jury trial in civil proceedings where the amount in controversy exceeds $15,000. SB 474 sought to increase the amount in controversy requirement to $30,000. SB 474 was accompanied by Senate Bill 475 ("SB 475"), which would amend the Courts and Judicial Proceedings Article of the Maryland Code to prohibit a party in a civil action from requesting a jury trial if the amount in controversy does not exceed $30,000. The MDC submitted opposition testimony.

Under current Maryland law, the District Court has exclusive jurisdiction for civil cases in which the amount in controversy does not exceed $5,000, and concurrent jurisdiction with the Circuit Court for any amount that does not exceed $30,000. The Circuit Court has exclusive jurisdiction over all jury trials and cases in which the amount in controversy is greater than $30,000. Because of the current structure of the law, if a plaintiff files a case in the District Court with an amount in controversy between $15,000 and $30,000, a defendant can demand a jury trial, which in turn requires that the case be transferred to the Circuit Court. If SB 474 and SB 475 had become law, cases with an amount in controversy between $15,000 and $30,000 could not have been tried by jury, and would have remained in the District Court.

District Court — Civil Jurisdiction — Amount in Controversy (Failed)

Unsuccessful House Bill 461 ("HB 461") would have expanded the original jurisdiction of the District Court to include civil actions seeking up to $50,000 in damages. Currently, the District Court has exclusive jurisdiction over civil matters seeking damages less than $5,000; landlord-tenant disputes; and replevin actions. The District Court has concurrent jurisdiction with the circuit courts for civil actions claiming between $5,000 and $30,000. HB 461 sought to increase the original jurisdiction of the District Court from $30,000 to $50,000. The MDC submitted opposition testimony, and the bill was eventually withdrawn.

District Court Jurisdiction — Uninsured Motorist Claim (Failed)

Unsuccessful House Bill 719 ("HB 719") would have placed uninsured motorist ("UM") claims within the exclusive original jurisdiction of the District Court if the amount of UM insurance is not higher than $30,000, and claimed damages did not exceed $50,000. Maryland law requires that drivers maintain minimum amounts of UM insurance in the amounts of $30,000 for bodily injury per person; $60,000 for bodily injury per accident; and $15,000 for property damage. The District Court has concurrent jurisdiction with the circuit courts for civil claims between $5,000 and $30,000. HB 719 would have expanded the original jurisdiction of the District Court to include claims up to $50,000 for first-party UM benefits. The MDC submitted opposition testimony, and the bill was eventually withdrawn.

Civil Actions — Noneconomic Damages — Catastrophic Injury (Failed)

Unsuccessful Senate Bill 479 ("SB 479") sought to amend the Courts and Judicial Proceedings Article of the Maryland Code in order to increase the maximum amount of noneconomic damages that may be recovered in cases of "catastrophic injury." Current Maryland law places certain caps on noneconomic damages based on the type of claim at issue.

In an action for damages for personal injury or death (excluding medical malpractice), the cap is $815,000 for causes of action arising between October 1, 2015 and October 1, 2016. In a wrongful death action, where there are two (2) or more claimants or beneficiaries, an award of noneconomic damages may not exceed 150% of the applicable cap, regardless of the number of claimants or beneficiaries.

Pursuant to SB 479, if a court in a post-trial motion in any civil action for personal injury or wrongful death, or a health claims arbitration panel in a medical malpractice claim, determined that the defendant's negligence or other wrongful conduct caused at least one catastrophic injury, then the limitation on noneconomic damages would triple. The term "catastrophic injury" was defined as death or permanent impairment constituted by one of the listed symptoms: (1) spinal cord injury associated with severe paralysis of an appendage or the trunk or with incontinence; (2) amputation and loss of effective use of an appendage; (3) severe brain injury; (4) blindness; (5) loss of reproductive organs that leaves a person sterile; or (6) major burns. A previous iteration of SB 479 was introduced in 2014 as House Bill 1009 and Senate Bill 789. Bill hearings were conducted by both chambers, but no action was taken by either the House Judiciary Committee or the Senate Judicial Proceedings Committee.

Aggressive Drunk Driving — Punitive Damages (Failed)

Unsuccessful Senate Bill 605 ("SB 605") would have permitted a finder of fact to award punitive damages against a personal injury defendant who had operated or attempted to operate a motor vehicle with a blood alcohol concentration of 0.15 or higher. Under current Maryland law, a trier of fact may not award punitive damages in a nonintentional tort action unless the plaintiff has established that the defendant's conduct was characterize by "actual malice." Under SB 605, certain offenses related to drunk driving could constitute "actual malice," such that the plaintiff would be entitled to punitive damages. The bill required a plaintiff to prove by clear and convincing evidence that the defendant/driver had a blood alcohol concentration of 0.15 or higher. SB 605 further required that claims for punitive damages under the bill be pled with particularity, and that any award of punitive damages must be accompanied by compensatory damages. SB 605 passed the Senate amended, but ultimately received an unfavorable report from the House Judiciary Committee with a vote of 12 to 8, and was defeated.

Continued on page 25

The MDC opposed SB 605 because it would change the established law on punitive damages. Instead of requiring a plaintiff to meet the "actual malice" standard for awarding punitive damages by showing an "evil motive [or] intent to injure," *Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420 (1992), it would deem this particular activity to constitute an "intent to harm" or "actual malice," as a matter of law. MDC posited that this would not be warranted or appropriate because the nature of compensation should be independent of the notion of punishment. Because administrative and criminal punishments are already in place, additional punishment for this activity should be handled administratively or criminally.

Civil Right to Counsel — Implementation (Failed)

Unsuccessful House Bill 348 ("HB 348") and Senate Bill 468 ("SB 468") would have required the Governor of Maryland to appropriate funds to provide legal representation to individuals with incomes below a certain threshold in contested custody and protective order proceedings. These appropriations would have begun in 2017, and provided counsel for those individuals meeting requirements established by the Maryland Legal Services Corporation ("MLSC"). A pilot program — the Judicare Pilot Program — would have been launched in Baltimore City, along with five (5) other select Maryland counties. The program would have been overseen by the Workgroup to Monitor Implementation of a Civil Right to Counsel, staffed by members of the Administrative Office of the Courts. HB 348 and SB 468 were ultimately defeated when SB 468 received an unfavorable report from the Senate Judicial Proceedings Committee with a vote of 6 to 4, and HB 348 was subsequently withdrawn.

Courts — Jury Service — Excusal (Failed)

Unsuccessful House Bill 260 ("HB 260") would have permitted an individual to be excused from jury service if the individual was a breast-feeding mother with a child less than two (2) years of age. HB 260 was heard before the House Judiciary Committee but never voted upon, and therefore did not pass during the 2015 legislative session.

Award of Attorney's Fees and Expenses — Violation of Maryland Constitutional Right (Failed)

Unsuccessful House Bill 283 ("HB 283") and Senate Bill 319 ("SB 319") would have authorized a court to award reasonable attorney's fees and expenses to a prevailing plaintiff for any claim for relief against the State, any political subdivision of the State, or any employee or agent of the State or any political subdivision of the State, if the claim for relief seeks to remedy a violation of a right that is secured by the Maryland Constitution or the Maryland Declaration of Rights. Under the bill, a court may award reasonable attorney's fees and expenses to a prevailing defendant only on a finding that the relevant claim for relief brought by the plaintiff was maintained in bad faith or without substantial justification. A court must determine whether to award attorney's fees and expenses by considering the factors listed in Maryland Rule 2-703(f)(3). The bills would have applied prospectively to cases filed on or after the bill's October 1, 2015 effective dates. The Maryland Defense Counsel ("MDC") submitted opposition testimony.

Civil Actions — Hydraulic Fracturing Liability Act (Failed)

Unsuccessful Senate Bill ("SB 458") would have made the practice of hydraulic fracturing an ultrahazardous and abnormally dangerous activity, and thereby imposed strict liability upon a company engaged in hydraulic fracturing. SB 458 would have also made any chemicals used in the hydraulic fracturing process subject to discovery in a legal action, irrespective of any objections based upon trade secret law, and increased the amount of comprehensive general and environmental pollution liability insurance coverage that a permit holder must maintain and increased the duration of coverage for environmental pollution liability insurance. Finally, SB 458 would have voided specified contractual waiver provisions pertaining to hydraulic fracturing activities.

Increase in Liability Limits under Local Government Tort Claims Act and Maryland Tort Claims Act (Passed)

Successful House Bills 113 ("HB 113") and 114 ("HB 114"), both passed on the final day of the Session, increase the liability limits under the Maryland Tort Claims Act ("MTCA") and the Local Government Torts Claims Act ("LGTCA").

The MTCA permits an individual to maintain a civil action against the State of Maryland, but caps the State's liability at $200,000. HB 114 increased the liability limit under MTCA from $200,000 to $400,000 to a single claimant for injuries arising from a single incident or occurrence. HB 114 also alters the notice requirements of MTCA by authorizing a court, upon a showing of good cause by a claimant who failed to submit a written claim within the one-year time period under MTCA, to entertain the claimant's action unless the State can affirmatively show that its defense has been prejudiced by the claimant's failure to submit the claim. The bill applies prospectively to a cause of action arising on or after October 1, 2015.

HB 113 similarly impacts the LGTCA, and also applies prospectively to a cause of action arising on or after October 1, 2015. The LGTCA is the local government counterpart to MTCA, and currently limits the liability of a local government to $200,000 per individual claim and $500,000 per total claims that arise from the same occurrence for damages from tortious acts or omissions (including intentional and constitutional torts). HB 113 increases the liability limits under the LGTCA to $400,000 per individual claim and $800,000 per total claims that arise from the same occurrence for damages from tortious acts or omissions. As originally introduced, HB 113 intended to limit liability under the LGTCA to $300,000, but that amount was ultimately increased to $400,000. The bill also extends the time period for giving notice of a claim to one year. The figure represents a compromise between House and Senate preferences for the liability limit, which were $300,000.00 and $500,000, respectfully. Of particular note, the liability limits of the LGTCA was made all the more important by the Maryland Court of Appeals' recent decision in *Espina v. Jackson*, ___ Md. ___, No. 35 (March 30, 2015), in which the Court held that the liability limits of the LGTCA extended to constitutional violations.

Get Involved With MDC Committees
www.mddefensecounsel.org/leadership.html.

Continued on page 27

Judgments — Appeals — Supersedeas Bond (Passed)

Successful House Bill 164 ("HB 164") specifies that the amount of a supersedeas bond posted in a civil action may not exceed the lesser of one hundred million dollars, or the amount of the judgment for each appellant, irrespective of the amount of the judgment appealed. HB 164 passed the General Assembly enrolled on April 13, 2015. Under Maryland law, a party cannot stay the execution of adverse judgment simply by filing an appeal. Rather, to stay execution pending an appeal, Maryland courts generally require the appellant to file a supersedeas bond pursuant to Md. Rule 8-423. Pursuant to Rule 8-423, when the judgment is for the recovery of unsecured money, the amount of the bond must cover the whole amount of the judgment remaining unsatisfied plus interest and costs.

Under HB 164, a supersedeas bond may not exceed the lesser of one hundred million dollars or the amount of the judgment for each appellant, regardless of the amount of the judgment appealed. The bill amends the Courts and Judicial Proceedings Article, to include Section 12-301.1. The new Section 12-301.1 would provide a procedure by which an appellee could engage in discovery for the limited purpose of determining whether an appellant dissipated assets outside the course of ordinary business when the appellant posts a supersedeas bond less than the amount of unsecured money subject to execution under the appealed judgment. The new law also provides the circuit court with jurisdiction over the action for the limited purpose of ruling on any motions relating to the new form of limited discovery.

Real Property — Condominiums and Homeowners Associations — Disclosures to Purchasers on Resale of Unit or Lot — Limitation on Fees (Failed)

Unsuccessful House Bill 1007 ("HB 1007") sought to limit the liability of homeowners associations and condominium councils for errors and omission in the content of a resale certification. HB 1007 intended to amend Section 11-1354 of the Real Property Article of the Maryland Code to cap fees charged by homeowners associations and condominium councils for providing resale certifications, and permit condominium councils to collect new fees for inspecting the resale unit. Most importantly, HB 1007 would have limited the liability of homeowners associations and condominium counsels for any error or omission in the certificate to the amount of the fees paid.

Judges — Mandatory Retirement Age (Failed)

Unsuccessful Senate Bill 847 ("SB 847") would have increased, subject to voter approval, the mandatory retirement age of judges in Maryland from 70 to 73. Article IV, section 3 of the Maryland Constitution sets mandatory retirement limits for all circuit, district and appellate court judges in Maryland. The current mandatory retirement age is set at 70. SB 847 failed on the House floor after receiving a favorable with amendments report by the House Judiciary Committee. Because the measure is a constitutional amendment, it would have required approval by the voters in the 2016 election.

Workers' Compensation — Benefits — Heart Disease and Hypertension Presumption — Anne Arundel County Detention Officers (Passed)

Successful Senate Bill 135 ("SB 135") and House Bill 173 ("HB 173") extend to Anne Arundel County detention officers an occupational disease presumption for heart disease or hypertension that results in partial or total disability or death. The presumption applies only to the extent that the individual suffers from heart disease or hypertension that is more severe than the individual's condition prior to being employed as a detention officer.

Certain public safety employees — including specified volunteer and paid firefighters, paramedics, and law enforcement officers — are entitled to receive enhanced workers' compensation benefits for permanent partial disabilities that are determined to be compensable for fewer than 75 weeks. Under current law, an employee who is not entitled to enhanced benefits is compensated at a rate that equals one-third of the employee's average weekly wage, not to exceed 16.7% of the State average weekly wage. SB 135 and HB 173 alter the definition of "public safety employee" to include Anne Arundel County detention officers, making these officers eligible for enhanced workers' compensation benefits for permanent partial disabilities that are determined to be compensable for fewer than 75 weeks.

Workers' Compensation — Baltimore County Deputy Sheriff (Passed)

Successful Senate Bill 331 ("SB 331") and House Bill 12 ("HB 12") alter the definition of "public safety employee" to include a Baltimore County deputy sheriff who sustains an accidental personal injury that arises out of and in the course and scope of performing duties directly related to (1) courthouse security; (2) prisoner transportation; (3) service of warrants; (4) personnel management; or (5) other administrative duties. A public safety employee who is awarded compensation for a period of fewer than 75 weeks for a permanent partial disability is compensated by the employer or its insurer at an enhanced rate that is equal to the rate for claims that are determined to be compensable for 75 to 250 weeks (two-thirds of the employee's average weekly wage, not to exceed one-third of the State average weekly wage). The bills apply only prospectively and do not have any effect on or application to claims arising before October 1, 2015.

Workers' Compensation Commission — Regulation of Fees and Charges (Failed)

Unsuccessful House Bill 1092 ("HB 1092") and Senate Bill 118 ("SB 118") sought to authorize, but does not require, the Workers' Compensation Commission ("WCC") to regulate payment of fees and other charges for (1) the examination of a covered employee; and (2) the preparation of a report by a medical expert. The bill also specifies that fees charged for a medical service or treatment or the examination and preparation of a report by a medical expert may not vary based on the party responsible for the payment of the fee or charge.

The fiscal impact of HB 1092 on employers and insurers in Maryland (including the State, Chesapeake Employers' Insurance Company, local governments, and small businesses) depends on if and how the WCC chooses to utilize its authority to regulate the fees specified by the bill.

Continued on page 29

Although the bill is only expected to have a minimal direct fiscal impact on employers and insurers in the State, Chesapeake advised the Committees that the bill may indirectly result in increased costs to employers and insurers. Due to the provision which specifies that fees may not vary based on the party responsible for payment of the fee or charge (and depending on how the WCC chooses to regulate these fees), employers and insurers may have difficulty obtaining independent medical examinations of injured workers. Examinations performed and reports prepared by a claimant's treating physician are generally less expensive because the treating physician has had many visits with the claimant and does not need additional time to review and understand his or her medical history. Conversely, an independent medical examiner hired by an employer or its insurer may not be familiar with the patient and, therefore, needs additional time to review a patient's medical records or prepare reports.

HB 1092 received a Unfavorable Report from the House Economic Matters Committee. SB 118 was never voted on by the Senate Finance Committee and failed at the conclusion of the Session.

Workers' Compensation — Permanent Partial Disability Compensation — Reversal or Modification of Award (Failed)

Unsuccessful House Bill 262 ("SB 262"), specified that, if a workers' compensation award of permanent partial disability is reversed or modified by the WCC or a court of appeal, the payment of any new compensation awarded must be subject to a monetary credit for compensation previously awarded and paid. As introduced, the bill must be construed to apply only prospectively and may not be applied or interpreted to have any effect or application to any compensation award made prior to the bill's October 1, 2015 effective date.

Section 9-633 of the Labor and Employment Article specifies that, if a workers' compensation award of permanent partial disability is reversed or modified by a court on appeal, the payment of any new compensation awarded must be subject to a credit for compensation previously awarded and paid. In July 2014, the Court of Appeals released a consolidated opinion for three recent cases related to this provision. In *W. R. Grace & Co., et al. v. Andrew P. Swedo, Jr.*, No. 82, September Term 2013; *Florida Rock Industries, Inc., et al. v. Jeffrey P. Owens*, No. 91, September Term 2013; and *Robert W. Coffee v. Rent-A-Center, Inc., et al.*, No. 92, September Term 2013 (Opinion filed July 22, 2014), awards of permanent partial disability were modified and extended by the court such that each employee was entitled to a higher weekly benefit amount.

The employers/insurers argued that these modifications should apply prospectively and that crediting should be done based on the total number of weeks that an employee has received compensation, citing *Del Marr v. Montgomery County*, No. 60, September Term 2006. In *Del Marr*, the court held that, in the event that a workers' compensation case is reopened by WCC and benefits are modified due to worsening of condition (which is governed by Section 9-736 of the Labor and Employment Article), credits should be based on weeks paid.

The Court of Appeals distinguished Del Marr from the case at hand, stating that a reopened case due to worsening of condition and a modification on appeal are two different circumstances. The Court of Appeals held that crediting for payments made under an award amended on appeal should be the basis of the total dollars paid, resulting in back pay to the employees.

The bill applies to two distinct situations. The first is when an award is reversed or modified on appeal to the circuit court, and the second is when a case is reopened by the WCC due to worsening of condition. There is no fiscal impact in the first situation, as the bill simply codifies the judicial decision in the court's consolidated opinion. However, there is a potentially significant fiscal impact in the second situation. Although the bill does not specify that its monetary credit provision must apply to cases that are modified due to worsening of condition, it clearly states, "[i]f an award of permanent partial disability compensation is reversed or modified by the commission or a court of appeal, the payment of any new compensation awarded shall be subject to a monetary credit for compensation previously awarded and paid." The reopening of a permanent partial disability case due to worsening of condition is a modification made by the WCC; thus, the bill applies in that situation.

HB 262 received an Unfavorable Report by the House Economic Matters on March 20, 2015.

Chesapeake Employers' Insurance Company (Passed)

Successful Senate Bill 465 ("SB 465"), among other things, subjects the Chesapeake Employers' Insurance Company to Title 11 of the Insurance Article. Chapter 570 of 2012 converted the Injured Workers' Insurance Fund into a private, nonprofit, and nonstock workers' compensation insurer as of October 1, 2013. This new organization is the Chesapeake Employers' Insurance Company ("Chesapeake").

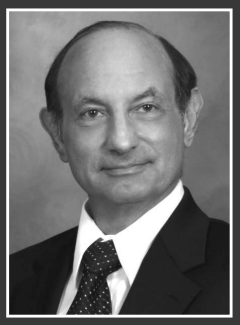
In subjecting Chesapeake to Title 11 of the Insurance Article, SB 465 effectives requires Chesapeake to join a rating organization, beginning January 1, 2023. Additionally, the rating organization must (1) make annual reports beginning October 1, 2016, and ending October 1, 2022, to specified committees of the General Assembly concerning the status of Chesapeake joining the rating organization; and (2) create a classification code for governmental occupations that are not already included in police, firefighter, and clerical classifications. Although the provisions related to the classification code requirement for the rating organization take effect January 1, 2022, the Act states that it is the intent of the General Assembly that the selected rating organization create an exception in its classification system on or before January 1, 2022, to allow any authorized insurer in the State to use a single classification code for governmental occupations that are not included in police, firefighter, and clerical classifications.

In addition, SB 465 authorizes Chesapeake to establish, own, or control a subsidiary for any lawful purpose if the subsidiary (1) is, or after acquisition will be, wholly owned by Chesapeake; (2) engages in a business activity that is ancillary to the workers' compensation insurance business; and (3) is operated for the purposes of benefiting Chesapeake. Furthermore, the Act alters the selection process for the Chesapeake board members. Under the Act, two of the board's

Continued on page 31

Joseph I. Rosenberg, CFA, LLC

Forensic Economics, Mediation, and Financial Advisory Services



Joseph I. Rosenberg, CFA

Offering Economic Analysis for Defense and Plaintiff in cases of Personal Injury, Wrongful Death, and Employment Law

- Loss of Earnings/Earning Capacity
- Loss of Household Services
- Valuation of Pensions and Other Benefits

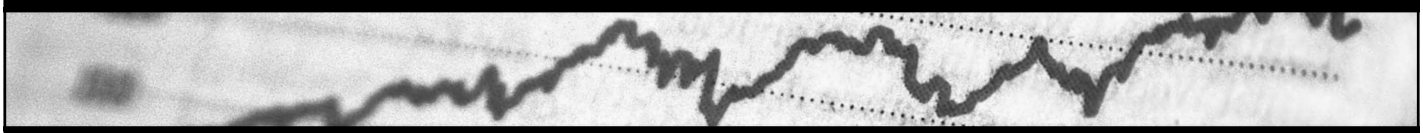
Experience

- Over 30 years of experience as economist and financial analyst
- Delivered economic loss appraisals in NJ, MD, PA, and DC
- Successfully assisted defense in obtaining materially-reduced award
- Twice-published author in *Journal of Forensic Economics*
- Recognized expert on topic of discounting damage awards
- Chairman of Investment Committee for DC area non-profit agency, managing endowment and pension funds

Credentials

- MBA, Finance, Accounting, and Statistics, University of Chicago
- MA, Economics, Virginia Polytechnic Institute
- Chartered Financial Analyst (CFA)
- Trained in Mediation and Collaborative Dispute Resolution

Phone: **(301) 802-0617** • Email: **jrosenberg123@gmail.com**



9821 La Duke Drive • Kensington, MD 20895

www.Joe-Rosenberg.com

nine members must be appointed by the Governor; the remaining seven members must be appointed by policyholders under the procedures required by the board's bylaws. The Act authorizes the removal of board members under certain circumstances and specifies, through a transition process, the appointment dates and term limits of board members through 2029. Specifically, the Governor shall appoint board members whose terms expire in 2015 through 2019.

As these new terms expire, the policyholders begin to appoint their seven members. Finally, the Act requires the Insurance Commissioner to review the State's self-insured workers' compensation program for State employees at least once every five years and submit a report of its findings to the State Treasurer. These provisions take effect October 1, 2015.

Currently in practice in the areas of litigation, corporate and contract law from the Annapolis, Maryland firm he co-founded in 2004, ***Christopher Boucher*** *has served clients both large and small across the nation for over 20 years. He is the incoming President-Elect and legislative Co-Chair of Maryland Defense Counsel ("MDC"). Chris is also the Maryland State Representative and participant in the Data Management and Security Committee of the Defense Research Institute ("DRI"). In addition to handling cases from suit to trial and appeal in civil matters and commercial litigation, Chris has also successfully mediated many cases in State Court in the last 10 years. Chris has drafted and negotiated contracts and served as corporate counsel for many companies in their governance and business transactions. He is also an economic reviewer of technological funding proposals for the Maryland Industrial Partnerships Program ("MIPS"), a member of the Health Information Systems Society ("HIMSS"), serving the health care technology field, and a pro bono volunteer.*

Michael L. Dailey *defends clients in Maryland and the District of Columbia in both liability and workers' compensation cases. He is a Founding Member of Schmidt, Dailey & O'Neill, LLC located in Baltimore. Michael is the President of the Maryland Defense Counsel and is a Co-Chair of the MDC Legislative Section; a member of the Maryland and District of Columbia Bars, and a member of the Defense Research Institute.*

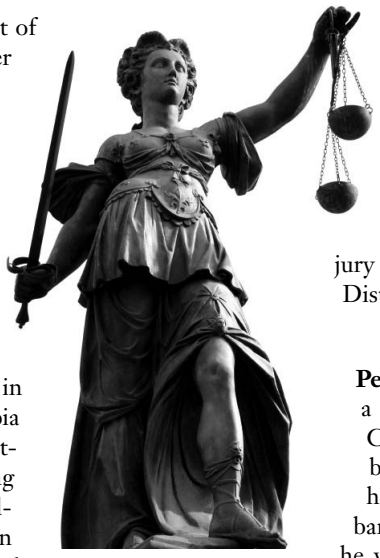
Colleen K. O'Brien *is an associate in the Litigation Department at Semmes, Bowen & Semmes. Her practice generally focuses on civil litigation in the areas of insurance defense, products liability, negligence based torts, toxic torts, business litigation, and life, health and ERISA claims, in the state and federal courts of Maryland.*

Nichole Nesbitt *is a partner with Goodell, DeVries, Leech & Dann, LLP and incoming president for the Maryland Defense Counsel (MDC) for the 2015 fiscal year. Ms. Nesbitt also serves as co-chair of the MDC's legislative committee. In that capacity, she appears before Maryland's General Assembly to testify on bills that have an impact on MDC's members and their clients. As a partner at Goodell, DeVries, Ms. Nesbitt handles cases primarily before the United States District Courts for Maryland and the District of Columbia, the Superior Court for the District of Columbia, and the Circuit Courts of Maryland. Her current practice concentrates on professional liability defense, complex commercial litigation, and employment law. Ms. Nesbitt has taken a special interest in the technological aspects of litigation and is often called upon to assist with cases in which electronically-stored information plays a significant role. Outside of the litigation context, Ms. Nesbitt is called upon regularly to counsel clients on risk management and litigation avoidance issues in both the healthcare and employment contexts.*

John Stierhoff *is a partner at Venable LLP and a prominent government affairs attorney whose lobbying practice represents the interests of businesses, health care entities, and numerous trade associations before the Executive Branch, Maryland General Assembly and local Maryland governments. Mr. Stierhoff is a graduate of Loyola College (B.A., 1977) and the University of Baltimore School of Law (J.D., 1981). Having served as Committee Counsel in the Maryland General Assembly, and as Chief of Staff and Counsel to Senate President Miller, for more than a dozen years before entering the private sector, John is well known for the creative and thoughtful approach he brings to addressing issues before state and local legislative bodies. That depth of experience has led to his successful representation of clients before a broad range of state and local elected officials and agencies.*

Spotlights

Craig L. Russell v. Call/D, LLC; District of Columbia Court of Appeals No. 13-CV-1177



In an opinion decided April 15, 2015, the District of Columbia Court of Appeals affirmed an October 15, 2013 Order of the Superior Court granting summary judgment in favor of the premises owner, Call/D, LLC. **Susan Smith**, **Thomas Bernier** and **Segal McCambridge Singer & Mahoney, Ltd.** obtained the summary judgment Order in favor of Call/D, who had been sued by Plaintiff Craig L. Russell on the basis that he had allegedly contracted Legionnaires' disease due to Call/D's negligent management of an apartment building.

In June 2012, Plaintiff brought his lawsuit in the Superior Court for the District of Columbia against Defendant Call/D, the owner of the apartment building in which Plaintiff resided, asserting "negligence — premises liability" and "strict liability/negligent failure to warn" claims based upon allegations that Russell had contracted the bacterial pneumonia known as Legionnaires' disease due to his exposure to *legionella* bacteria present in standing water in a vacant apartment within Defendant's building. Plaintiff had no testing that proved that *legionella* was ever present in the premises. Instead, Plaintiff proffered the testimony of pulmonologist, Steven Zimmet, M.D., who testified that it was his opinion that the vacant apartment was the source of Russell's exposure to the bacteria.

Following extensive discovery, the defense challenged Dr. Zimmet's qualifications to offer a source opinion as well as his factual basis for the conclusion that the water on the apartment floor contained *legionella*. Superior Court Judge Natalia Combs Greene granted the motion precluding the admission of Dr. Zimmet's opinions and then granted summary judgment, finding as a matter of law that there was no evidence to support any finding that Call/D's premises was the source of Plaintiff's infection. Plaintiff filed an appeal which was argued on October 21, 2014. Phyllis D. Thompson, Associate Judge, writing for the Court, affirmed the Superior Court's Orders, specifically finding that Judge Combs Greene did not abuse her discretion in precluding Dr. Zimmet's opinions.

IDS Property Casualty Insurance Company v. Glenmont Air Conditioning & Heating, Inc. et al. Case Number: 8:13-cv-02238-TDC

Edward J. "Bud" Brown of the **Law Office of Edward J. Brown, LLC** obtained a defense verdict for his client, an energy auditor, wrongly accused of negligently causing a house fire in Adelphi, Maryland. The case focused on the supervision and performance of post-audit insulation efforts, particularly the presence *vel non* of recessed light covers. The fire occurred in an older home, and the recessed light at or near the area of the origin of the blaze sustained substantial damage, which prevented effective identification of same. Plaintiff was the carrier for a very nice elderly couple, and the light fixture in question was utilizing a heat lamp bulb in order to provide extra warmth to the homeowners' master bathroom. The cause of the fire was hotly contested, with competing expert testimony regarding the covers, as well as alternative explanations, including potential electrical issues. Judge Theodore Chuang presided over the jury trial in the Greenbelt Division of the United States District Court.

Peggy Fonshell Ward, **Ward & Herzog**, received a defense verdict in the Circuit Court for Harford County in a case involving a claim of assault and battery. The Plaintiff asserted that his neighbor had assaulted him during an encounter regarding a barking dog. The defendant neighbor claimed that he was merely defending himself against the advances and actions of the plaintiff, who had a .22 blood alcohol content during the interaction. Plaintiff had severe brain injury from a subdural hematoma occurring when he fell and his head hit the ground.

Peggy Fonshell Ward, **Ward & Herzog**, successfully persuaded the Court of Special Appeals that her client insurer was the excess insurer in a dispute with another insurer who claimed the companies were co-primary. Two insurers both insured a truck involved in a serious accident. Insurer B claimed that it was excess because the truck was owned by Insurer A's named insured and the respective "other insurance" clauses made the owner's policy primary. The Circuit Court for Wicomico County agreed with Insurer A that the two were co-primary at 50% each. The Court of Special Appeals reversed and ruled that Insurer B was correct and that Insurer A was primary and Insurer B excess.

Andrew Nichols of **Rollins, Smalkin, Richards and Mackie** obtained a defense verdict after a two-day jury trial in the Circuit Court for Harford County. Plaintiff, a unit owner of a condominium, slipped and fell on the sidewalk in front of a building in the condominium community during the two snow storms that created "Snowmagedon" in 2010. Plaintiff sued the condominium association, property management company and snow removal contractor, alleging negligence. Nichols, representing the condominium association and property management company presented evidence that while the condominium association had notice of the potential for ice formation in the area where Plaintiff fell, there had been no prior falls in that area, and that Plaintiff had similar notice regarding the potential for ice formation.

After 22 minutes of deliberation, the jury returned with a verdict, finding no negligence on the part of the defendants.

Maryland Defense Counsel, Inc. Presents

Annual Meeting and Crab Feast

June 17, 2015
5:30 p.m. – 7:30 p.m.

Nick's Fish House
2600 Insulator Drive
Baltimore MD 21230

For More Information:

Kathleen Shemer
(410) 560-3895
kshemer@mddefensecounsel.org

Learn more at www.mddefensecounsel.org