



THE DEFENSE LINE



A Publication From The Maryland Defense Counsel, Inc.

Winter 2011

Don't Take Their Word For It — Attack The Plaintiffs' Expert

John T. Sly & Christina N. Billiet

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Summer Associate Candidate**

Lydia S. Hu

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PRESIDENT'S MESSAGE

Welcome back, MDC members. I am honored to be serving as MDC's president and am looking forward to a busy and productive year.

We are beginning the 2010 board year with a series of anniversaries. Perhaps most importantly, this year marks Executive Director Kathleen Shemer's twentieth anniversary with MDC. Anyone who has worked with Kathleen will tell you that she is the backbone of the organization. She is completely unflappable, unfailingly polite, helpful, and patient. Kathleen quite simply is the engine that drives the train and I, for one, am glad to work with her. Thank you, Kathleen, on behalf of all of us.

This year also marks the Pro Bono Resource Council's twentieth anniversary, which it marked with a gala on November 13, 2010 at the Cylburn Auditorium. The PBRC asked many of the local and specialty bar associations to designate a "Pro Bono Star" to be honored at the gala. MDC is proud to have designated Woods "Woody" Bennett based on his many years of work with Kids Chance of Maryland, Inc. Kids Chance provides scholarship and other assistance to the children of men and women who have been seriously disabled or killed at work.

And this year the MDC Board will be revisiting

our Long Range Plan. The plan was developed about four years ago and was intended to guide the Board in improving communications with and providing greater service to the organization's members and broadening our outreach (to law students, for example). Over the past few years we've achieved some of our goals and made a great deal of progress on others. This January, the Board will meet to review and revise the plan so that, going forward, the organization remains effective, relevant, and a reliable source of information and education for the Maryland civil defense bar.

To that end, I would like to hear from you. What programs do you find most helpful in your practice? What format of programming would you prefer: in person, via webinar, or teleconference? What about your membership in MDC is most (or least) valuable to you? Contact me at (410) 659-8321 or jlubinski@fblaw.com.

Finally, *The Defense Line* is receiving some much needed attention this year. To ensure that we continue to deliver up to date, informative content, we are converting to an electronic format. We will continue to deliver hard copies of *The Defense Line* for now thanks to our sponsor, Courthouse Copy. If you would like to discontinue paper service, please contact Executive Director Kathleen Shemer.



**Jennifer S. Lubinski,
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Top Ten Interview Tips For The Summer Associate Candidate

Lydia S. Hu



You fix the collar on your shirt and straighten out your suit jacket. It feels like you have been sitting on the cold leather couch next to the receptionist for hours. You pull out your portfolio to glance at the letter-perfect, one-page resume, printed on crisp paper, just one last time. Despite your impressive first year class rank and involvement in countless academic extracurricular activities, including law review and moot court, your head still spins with thoughts of self-doubt and your stomach is a ball of nerves. Your heart is pounding, your palms are sweating, but before you even have time to jump to your feet to begin pacing, the boardroom doors swing open and you are shuffled into the conference room to begin the *On-Campus Interview*.

Okay, perhaps I exaggerate just a tad, but for some law school students, mastering the On-Campus Interview is a formidable task. The On-Campus Interview process comes at the start of the second year of law school, a very busy time for any law school student. Law students juggling classes, with recently inherited journal responsibilities, and moot court meetings, have little time to apply for competitive Summer Associate Positions.

Trust me, I know the experience. I lived through it only a couple of years ago. I remember the stress, the uncertainty, and the busy schedule. But, I bring you good news — I survived, and you will, too.

I recently finished my first year as an associate at my Firm, and I currently enjoy the honor and privilege to participate in my Firm's recruitment process. I have the opportunity to meet with countless aspiring lawyers full of enthusiasm for the law and curiosity about my Firm. I must say, transitioning from interviewee to interviewer is a humbling and eye-opening experience. As a relatively recent law school graduate myself, I can still empathize with the interviewee, while critically evaluating the quality of each interview. Using my unique position, I have crafted some interview tips, which I hope will assist you in preparing for your On-Campus Interview.

Tip #1: Confident body language. Obviously a good handshake and steady eye contact are

musts. Sit up straight, do not slouch. Do not cross your heel over your knee and lean back in the chair. Do not lean over the table at me. Simply walk in confidently, shake my hand, hold steady eye contact, and take a seat. Try to find out whether you will meet with one interviewer at a time or multiple interviewers in a panel style. If it is a panel style, remember to make eye contact with each interviewer during the introduction. Also, make sure to scan the interviewers while you answer questions. Most importantly, do not forget to smile.

Tip #2: Debbie Downer Need Not Apply. Do not start off the interview with a complaint. Was there traffic? Is it raining? Are you tired today because you stayed up late preparing for this interview? Please do not tell me. Call your friends later and tell them because they will care more than your interviewer. Make sure you keep it positive and light. Remember, you want the Firm to want you, and no one wants to work with a Debbie (or, Donnie) Downer. Set the tone of the interview with positive upbeat comments from the start.

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Editor's Corner

The Editors are proud to publish this latest edition of *The Defense Line*, which has a new look and features several interesting articles and case spotlights from our members. The lead article, submitted by John T. Sly and Christina N. Billiet of Waranch & Brown, LLC, provides an update on some recent changes in Maryland medical malpractice law and procedure, including some useful tips on how to attack a plaintiff's expert witnesses. An article by Matthew Schroll of Miles & Stockbridge P.C. discusses a recent Maryland appellate court opinion in which Maryland's statutory non-economic damages cap was upheld. Lydia S. Hu of Semmes, Bowen & Semmes, P.C. provides interview tips for summer associate candidates, which is equally as interesting and relevant for those of us that conduct the interviews as it is for the law students on the other side of the interview table. Finally, MDC's Judicial Selections Committee (Marisa A. Trasatti, John Sly, and Laurie Ann Garey) have submitted a brief article discussing the committee and the judicial selection process in Maryland.

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

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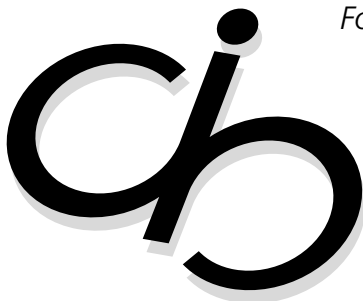
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Tip #3: Google. Do your research about the interviewers and the Firm. This level of preparation will serve two purposes — it prepares you to shift the conversation back to the interviewer and it demonstrates that you are genuinely interested in the job. During all conversations, interview and non-interview, there will inevitably be some lag between statements. A great way to fill the time is to ask the interviewer an informed question about interviewer's experiences or the Firm. After all, everyone enjoys talking about themselves and their jobs.

Tip #4: Know about the Grand Prix. I work in Baltimore, Maryland, and if you are from the area, then you know that the Grand Prix is coming to the city in 2011. The roads are undergoing major reconstruction in anticipation of the race. I interviewed one out-of-state candidate who casually inquired about the auto race, and I was thoroughly impressed because he obviously took the time research Baltimore, which demonstrates he was serious about the job. In general, be prepared to comfortably discuss the headline news. Nothing is a bigger turn-off than a candidate who is not in touch with current events.

Tip No. 5: You are a subject matter expert. The best interviewees are subject matter experts — and what is the subject? Themselves. You know yourself better than anyone else, so show it off! Know your resume and know your writing sample inside and out. Before the interview process begins, try to think of three characteristics or traits you want to convey about yourself. Using these three traits, you can create theme. Then, no matter what question is thrown at you, you know you can answer it by referencing that theme.

Tip #6: Breathe. Remember to speak slowly and let the interviewer ask some questions, too.

Tip #7: Pass the shovel, because you are not digging holes today. I loathe those terrible questions that hand you a shovel and ask you to dig a hole for yourself. These questions typically elicit negative information by asking you to identify your weaknesses or to speak negatively about someone or something. Unfortunately, there are interviewers who relish the opportunity to ask these questions. I suggest you handle it by staying positive — never speak poorly or negatively about anyone or anything during your interview. “Cory Candidate, tell me

why you are better qualified than the other applicants that I have interviewed today.” Hopefully, Cory has read this article and knows to flip the script. He answers, “While I have not had an opportunity to meet the other candidates for this position, I have no doubt they are qualified for the job because I know your Firm interviews only the most competitive applicants, and I am honored to be among them. I am qualified for this job because my military background has trained me to handle stressful situations while maintaining clear judgment and my academic performance indicates that I can handle high caliber work.” That answer successfully acknowledges the other candidates without speaking negatively about them, but refocuses the answer on Cory's individual strengths.

Tip #8: Be Creative. It is okay to be creative with your answers, especially when you feel you have established a bond with the interviewer. The best way I can explain this is through a personal story. I once interviewed with a female senior associate for a summer job. As soon as I met her, I could tell she was a kindred spirit — totally decked out in the most gorgeous gray tailored suit, red patent leather shoes with small gold

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Executive Director's Message — Announcing Exciting Changes for Members!

An Electronic Version of *The Defense Line* is in the Works

This Defense Line arrived with a fresh look—a bold new cover, easy to read fonts, more photos, and other design updates—but even more changes are on the way. Soon members will receive an electronic copy of the Defense Line with great new features: a professional looking html e-mail that mirrors the design of the print version, delivered directly into your e-mail in-box, and easy to share with colleagues. Just click to read the full stories on MDC's site, and a "Share" link appears at the bottom of the message.

For those of you who prefer your news on paper, don't be alarmed—you still will receive a copy that is printed and mailed courtesy of Courthouse Copy, official sponsor of the MDC.

Expert List Now Posted on the Website

MDC now provides a list of experts that our members have come in contact with during the course of practice. The list is not a list of defense-oriented doctors but rather provides links to defense attorneys who, in their experience, have culled information on experts in a variety of areas that may be helpful in choosing appropriate witnesses, cross-examining others etc.

To check it out, please go to www.mddefensecounsel.org and click on "Expert List" in the left hand corner of the home page or you may access it from the directory page. Follow the instructions for obtaining your password, agreeing to the terms and conditions, and gaining access. If you have trouble obtaining a password, please email kshemer@mddefensecounsel.org. After accessing the list, if you need further information or member input concerning an expert, you may still request that Kathleen Shemer send an email to the members with your question.

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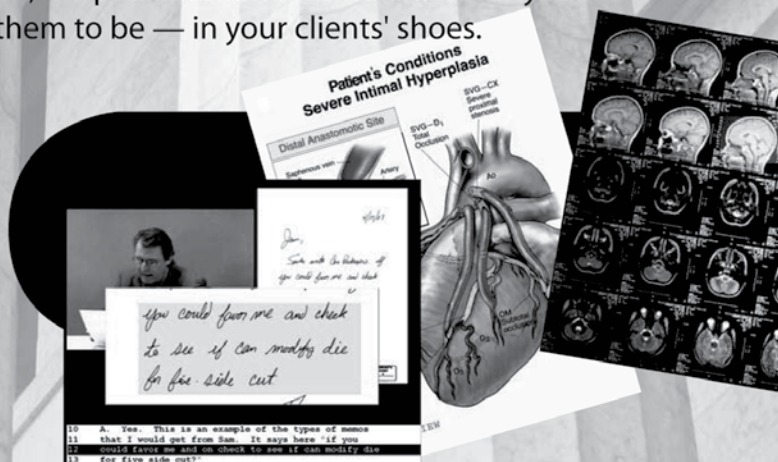


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(INTERVIEW TIPS) *Continued from page 7*

embellishments, and eye catching earrings that would make any fashionista stop and admire. I knew we could bond over our shared appreciation for quality designer suits and accessories. She asked the standard questions — What are your five year goals? What areas of the law interest you? And, then she asked the perfect question. She asked “I have so enjoyed meeting you today, but I have dozens of candidates to interview. Why should I recommend you to the hiring committee over someone else?” I smiled and asked, “Do you like to shop?” She nodded affirmatively and I said, “So do I, and I bet you’re like me, and you have a great shoe collection. Think about your favorite pair work shoes and think about why you like them. They are dependable. They combine style, flair, and comfort. They are great for the client meeting, the board room, the courtroom, and that after work networking reception or Friday Happy Hour with friends. They get you from point A to B, they are never uncomfortable, and they compliment all of your outfits. I would like

to think that I’m like that favorite pair of shoes. I am accommodating and know how to be a supportive team player. I know my strengths in research, time management, and ability to handle many projects at once. I am comfortable in a variety of settings and I can transition from the boardroom to the courtroom and to the dinner with clients and I will not let you down.” On that note, we concluded the interview. Did I get that offer? You bet. I think my answer set me apart, showcased my aptitude to think on my feet, and demonstrated my ability to be creative and memorable.

Tip #9: “I’m not cocky, I’m confident. So when you tell me I’m the best, it’s a compliment.” Love him or not, Kanye West undoubtedly understands confidence. There is a fine line between confident and egotistical, but knowing your strengths and competently discussing them is expected during an interview. This is not the time for modesty. So, how can you do that without going overboard? Talk in specifics. Use the facts. Use examples. Are you a great leader? Instead

of telling me you are a natural born leader, tell me how you were elected the president of your collegiate legal fraternity and lead a group of 100 members to raise \$50,000 to benefit your organization’s philanthropy.

Tip #10: Thank you. Send a thoughtful thank you email as soon as possible. That time the interviewer spent with you, was time she was not billing. Be thankful.

Incorporating these tips is easier said than done. Just like developing oral argument skills, practice makes perfect. Remember, the fact that you are granted an On-Campus Interview is a testament to your academic success. In fact, you are presumed qualified! The interview only serves as a personality litmus test, so relax, be yourself, and have fun. Good luck!

Lydia S. Hu, Esq. is an Associate at Semmes, Bowen & Semmes, a Professional Corporation, in Baltimore, Maryland. Her civil litigation practice focuses on insurance defense and products liability. She graduated magna cum laude from the University of Baltimore School of Law in May 2009.

Judicial Selections Committee

Marisa A. Trasatti, John T. Sly & Laurie Ann Garey

Maryland Defense Counsel (“MDC”) strongly believes that it can best help ensure Maryland has a fair and competent civil justice system by being directly involved on the front end with the process of selecting jurists for our State.

Under Maryland’s constitution, judges are appointed by the Governor and, except for circuit court judges, must be confirmed by the Senate. Since 1970, Maryland governors have adopted executive orders creating Judicial Nominating Commissions to recommend candidates for appointment.

In most instances, governors have made appointments from the list produced by the judicial nominating commissions. It is MDC’s intent to positively influence the process at every step. Therefore, MDC interviews candidates for every circuit court and appellate appointment and forwards its recommendations directly to the Judicial Nominating Commission, c/o The Administrative Office of Courts. Where appropriate, our Committee has also communicated directly with the governor’s office.

The Nominating Commission in Maryland then meets to interview all

candidates and reviews the recommendations of the various specialty bar associations, including MDC.

Thereafter a voting session takes place and the names of nominees are reported to the Governor. This usually occurs the same day or morning after the Commission meets.

Interviews of judicial candidates by MDC generally occur in the evening on workdays. Semmes, Bowen & Semmes has generously provided space for the interviews. The Committee has found the location to be convenient to candidates and interviewers alike.

There is no particular training required to participate in the interviews. The process has proven most rewarding for the interviewers who get to meet some of the brightest and best legal minds in our State. The Committee invites and strongly urges all MDC members to participate in the interviews. You can be added to the invitation list by emailing John T. Sly at jsly@waranch-brown.com. The Committee will then ensure you are notified of the upcoming interviews. We look forward to your assistance.



Expert Information Inquiries

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

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

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Don't Take Their Word For It — Attack The Plaintiffs' Expert

John T. Sly & Christina N. Billiet



Since 2005, the landscape of medical malpractice litigation has changed dramatically in Maryland. This article addresses several of those changes and offers strategies which may be useful in attacking plaintiffs' certificates of merit and certifying experts.

Is The Plaintiff's Expert "Qualified"?

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)). In Maryland, the body which arbitrates claims against health care providers is the Health Care Alternative Dispute Resolution Office ("HCADRO"). Thus, pursuant to the Malpractice Claims Act, a plaintiff is required to initially file their Statement of Claim in the HCADRO.

The vast majority of plaintiffs wish to litigate their claims in Circuit Court, rather than submit to arbitration in the HCADRO. However, a plaintiff may only waive arbitration and file a complaint in the Circuit Court after filing a certificate of qualified expert and report with HCADRO, pursuant to CJP section 3-2A-04.¹ Filing a certificate of qualified expert and accompanying report, both of which must comply with various statutory requirements, 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. Konitz*, 400 Md. 167, 172, 929 A.2d 19, 22 (Md. 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.* The certificate of qualified expert and report are intended to "certify" that the plaintiff's case against a particular health care provider is meritorious. 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. Ideally, this requirement prevents health care providers from having to defend non-meritorious claims.

In *Walzer*, the Court of Appeals interpreted CJP section 3-2A-04(b) and established detailed requirements for the contents of the report. The Court determined that the report must contain something more than just a mere recitation of the language in the certificate. The *Walzer* Court stated:

While it is arguably unclear from the Statute exactly what the expert report should contain, common sense dictates that the Legislature would not require two documents that assert the same information. Furthermore, it is clear from the language of the Statute that the certificate required of the plaintiff is merely an assertion that the physician failed to meet the standard of care and that such failure was the proximate cause of

the patient-plaintiff's complaints. *It therefore follows that the attesting expert report must explain how or why the physician failed or did not fail to meet the standard of care and include some details supporting the certificate of qualified expert... Accordingly, the expert report should contain at least some additional information and should supplement the certificate.*

Id. at 582-83 (emphasis added). 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).

The expert witness who provides the plaintiff with a certificate of *qualified* expert and report must be just that — *qualified*. Recent amendments to the Malpractice Claims Act restrict a witness' ability to testify in a field outside his own specialty. In order to testify with regard to the standard of care or how it was breached, the expert must possess the same board certifications as the health care provider about whom he is testifying, unless certain exceptions apply. Under this statute, for example, an emergency medicine physician would be statutorily unqualified to offer opinions in a certificate of qualified expert or at trial regarding a board certified otolaryngologist. The statute states as follows:

(2) (i) This paragraph applies to a claim or action filed on or after January 1, 2005.

(ii) 1. In addition to any other qualifications, a health care provider who attests in a certificate of a qualified expert or testifies in relation to a proceeding before a panel or court concerning a defendant's compliance with or departure from standards of care:

A. Shall have had clinical experience, provided consultation relating to clinical practice, or taught medicine in the defendant's specialty or

¹ Although an infrequent occurrence, the parties can mutually agree to waive arbitration, pursuant to §3-2A-06A. When arbitration is mutually waived, the plaintiff is not required to file a certificate of qualified expert.

It's Monday, the First Day of the Rest of Your Life.



Too bad last Friday was the last day to file the Bergstrom motion.

Did you know that missing deadlines continues to be one of the most common mistakes leading to malpractice claims? The failure to file a document is the second most common alleged error and the failure to calendar properly was the fifth most common mistake leading to a malpractice claim*. A dual calendaring system which includes a firm or team networked calendar should be used by every

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a related field of health care, or in the field of health care in which the defendant provided care or treatment to the plaintiff, within 5 years of the date of the alleged act or omission giving rise to the cause of action; and B. Except as provided in item 2 of this subparagraph, if the defendant is board certified in a specialty, *shall be board certified in the same or a related specialty as the defendant.*

2. Item (ii)1.B of this subparagraph does not apply if:

A. The defendant was providing care or treatment to the plaintiff unrelated to the area in which the defendant is board certified; or

B. The health care provider taught medicine in the defendant's specialty or a related field of health care.

CJP § 3-2A-02 (c)(2).

Because the Court of Appeals and the Legislature have recently put teeth into the certifying requirements, defense counsel often receive detailed and lengthy certificates and reports from plaintiffs. Preliminarily, defense counsel must ask themselves whether the certifying expert is statutorily qualified to offer such opinions. If he is not qualified, a motion to dismiss should be filed.

“Pinning Down” The Plaintiff's Certifying Expert Early

Assuming the expert is qualified, at least on paper, defense counsel must question (a) the range of the expert's opinions and (b) what the certifying expert relied on to formulate his opinions. Absent the answers to these questions, defense counsel may spend valuable time chasing down the plaintiff's real theory of the case and the bases for it.

It is important to identify the bases for the expert's opinions, and thereby gain an understanding of what opinions are actually being offered, as early as possible. This will assist in narrowing the issues in the case before substantive discovery occurs. An early deposition of plaintiff's certifying expert — before any other depositions are completed — accomplishes both of these goals and can lead to much more efficient litigation.

The ability to depose a certifying expert witness early in litigation, solely for the purpose of determining the basis for the expert's certificate and report, can offer the defense an important strategic advantage. Namely, defense counsel has the opportunity to “pin down” the expert's particular



criticisms and identify holes in the plaintiff's theory of liability. Less often, defense counsel may “catch” an expert who has attested to breaches of the standard of care in their certificate or report without having the factual information necessary to render such opinions.

At least two Maryland Circuit Court judges have interpreted the language of the Malpractice Claims Act, in conjunction with the Maryland Rules relating to discovery, to mean that a plaintiff's expert can be deposed twice — once as to the basis of their certificate and report, and a second time in the regular course of discovery, assuming the expert is designated as one prepared to offer opinions at trial.

Although this tactic is unusual, it finds support in the plain language of the relevant legislation. Section 3-2A-04(b)(3)(ii) of the Act states that “discovery is available as to the basis of the certificate.” Maryland Rule 2-401(a) provides that parties may obtain “discovery” by conducting depositions upon oral examination or written questions. Read together, these provisions support the position that a certifying expert can be deposed early in litigation with regard to their certificate and report, and then again in the regular course.

This tactic also ensures that the certifying expert will be deposed — a plaintiff is not required to designate their certifying expert to testify at trial. In such a case, pursuant to the traditional “discovery deposition only” position, defense counsel would never be afforded an opportunity to determine the basis for the expert's certificate and report. However, if a certifying expert can be deposed solely on the basis of their certificate and report, defense counsel cannot be stymied in this effort.

When presenting this argument to the court, it is helpful to point out that the cardinal rule of statutory construction “is to ascertain and effectuate the intent of the Legislature.” *Stoddard v. State of Md.*, 395

Md. 653, 661, 911, A.2d 1245, 1249 (2006). The analysis begins by examining the plain language of the statute based on the underlying premise that “the Legislature is presumed to have meant what it said and said what it meant.” *Id.* at 661 (quoting *Witte v. Azarian*, 369 Md. 518, 525, 801 A.2d 160, 165 (2002)). By its terms, section 3-2A-04(b)(3)(ii) clearly affords defendants the right to conduct discovery “on the basis of the Certificate” (emphasis added). To assume otherwise is inconsistent with the plain language of the statute.

Judges Leo E. Green and Thomas P. Smith, both from the Circuit Court for Prince George's County, have recently ordered that the plaintiff's certifying expert be produced for deposition on the basis of the certificates and reports, and then be produced a second time for a discovery deposition if the expert were to be offered at trial. Their rulings were based upon the arguments laid out in this article. In each case, the early deposition of the plaintiff's certifying expert played a critical role in defense counsel's (a) determination of whether the expert was statutorily qualified to offer standard of care opinions, (b) precise and efficient identification of each allegation of negligence and the bases for each and (c) preparation of a comprehensive defense.

In an appropriate case, the early deposition of a plaintiff's certifying expert can prove invaluable. In our experience, plaintiffs have uniformly denied our requests to depose their certifying expert twice, making court involvement necessary in the form of a motion to compel. If the motion to compel is granted, defense counsel should be prepared to depose the plaintiff's expert in as surgical a fashion as possible, focusing on the expert's qualifications and on identifying the particular criticisms of your health care provider client. To a large extent, this is a novel defense tactic; thus, plaintiffs' lawyers and/or their experts may be unprepared for the scope of the deposition or be unappreciative of the impact it can have on their case.

John T. Sly is a partner at Waranch & Brown, LLC and Christina N. Billiet is an associate at Waranch & Brown, LLC

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DRD Pool Service, Inc. v. Freed

Matthew Schroll



On September 24, 2010, in *DRD Pool Service, Inc. v. Freed*, 5 A.3d 43, 416 Md. 46 (2010), the Court of Appeals of Maryland upheld the Maryland's statutory cap on non-

economic damages in a six to one decision. The Court held that the cap does not violate a plaintiff's constitutional right to a jury trial or the guarantee of equal protection under the United States Constitution and Maryland Declaration of Rights.

The *Freed* case arose from the death of a boy who drowned at a country club pool. The boy's parents brought a wrongful death action in the Circuit Court for Anne Arundel County against DRD Pool Service alleging DRD's negligence in maintaining the pool. The jury found DRD was negligent and awarded the parents approximately \$4 million in non-economic damages. The award was reduced to approximately \$1 million under the statutory cap codified in MD. CODE, CTS. & JUD. PROC. § 11-108. The plaintiffs filed a motion to alter the judgment and challenged the constitutionality of the cap, which the Circuit Court denied. The Court of Appeals granted certiorari to consider plaintiff's challenge to the cap on non-economic damages.

On appeal, the plaintiffs argued that the Court should employ a heightened standard of review to examine the statutory cap because the cap implicates important personal rights rather than economic or commercial rights. Under this argument, the statutory cap infringes on a plaintiff's traditional right to have the jury determine the amount of damages as guaranteed by the right to a jury trial afforded by the Maryland Declaration of Rights. Furthermore, the plaintiffs argued that the statutory cap violates the Constitutional guarantee of equal protection because it discriminates against a class of grievously injured claimants. The defendant, DRD Pool Service, argued that the doctrine of *stare decisis* compelled the Court to follow its own precedent and uphold the statutory cap. DRD additionally contended that plaintiffs' arguments regarding the right to a jury trial and equal protection were not novel and as a result did not warrant a departure from *stare decisis*.

Maryland Defense Counsel, Inc.

("MDC") submitted an *amicus curiae* brief urging the Court of Appeals to reject the constitutional challenge to the cap. In response to the plaintiffs' arguments that the cap violates the right to trial by jury, MDC demonstrated that jury awards may be displaced if a judge applies remittitur. Thus, the statutory cap has the same effect as constitutionally approved remittitur. Further, MDC contended that the cap did not violate the guarantee of equal protection because the cap did not classify among plaintiffs who have been more severely injured. Rather, MDC argued that monetary awards do not correlate with the severity of injury, and that the statutory cap applies equally to plaintiffs based on the amount of the award and not the severity or type of injury.

In affirming the decision of the Court of Special Appeals, the Court relied *Murphy v. Edmonds*, 325 Md. 342 (1992), in which the Court found that the statutory cap was an economic regulation subject to rational basis review rather than a heightened form of scrutiny. Thus, the Court considered the cap a legislative policy judgment that did not infringe on a plaintiff's right to a trial by jury. After noting the few narrow exceptions for departure from the doctrine of *stare decisis*, the Court concluded that plaintiffs had not presented sufficient evidence or persuasive arguments to depart from the prior decisions upholding the cap. In dis-

sent, Judge Murphy argued that heightened scrutiny should apply to determine whether the cap violates the guarantee of equal protection.

In upholding the cap, Maryland broke from two other state high courts—Illinois and Georgia—that recently declared similar statutory caps on non-economic damages unconstitutional under the same arguments considered by the Court of Appeals. See *Lebron v. Gottlieb Mem'l Hosp.*, 930 N.E.2d 895 (Ill. 2010) (invalidating cap under separation of powers); *Atlanta Oculoplastic Surgery, P.C. v. Nestlebutt*, 691 S.E.2d 218 (Ga. 2010) (holding cap violates the constitutional right to trial by jury). Given the Court of Appeals' faithfulness to *stare decisis*, Maryland's statutory cap on non-economic damages can be considered settled law.

Matthew Schroll is an associate at Miles & Stockbridge P.C. in the firm's Products Liability Practice Group.

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SPOTLIGHTS

Goodell Obtains Key Appellate Win in District of Columbia for Elevator Manufacturer: Decision Clarifies D.C. Law on Overlapping Doctrines of Elevator Contributory Negligence and Assumption of the Risk

The District of Columbia Court of Appeals issued its opinion in *Phillips v. Fujitec America, Inc., et al.*, No. 09-cv-480, on September 2, 2010, affirming summary judgment for GDL's client, an elevator manufacturer, and several co-defendants. Each was accused of negligence after a young woman tragically fell to her death while trying to climb out of an elevator cab that had stalled between floors of a building she was visiting. Sid Leech won summary judgment in the District of Columbia Superior Court, arguing that the decedent was contributorily negligent and had assumed the risk of injury by climbing out of the elevator instead of listening to instructions to wait for help to arrive. Sid also argued the case on appeal. Derek Stikeleather assisted with the trial court and appellate briefing.

The trial court found that the decedent's assumption of the risk barred any recovery by her parents and granted summary judgment to all defendants. On appeal, the plaintiffs argued that because the trial court had affirmatively stated that it could not grant summary judgment on contributory negligence, the decedent could not have assumed the risk of injury as a matter of law. In a remarkable opinion, the D.C. Court of Appeals rejected the trial court's reasoning but affirmed its result. It held that the trial court's legal analysis of contributory negligence was incorrect because the decedent was contributorily negligent as a matter of law. The opinion, which is to be published by the Court as binding precedent, clarifies D.C. law on the interplay between the overlapping doctrines of contributory negligence and assumption of the risk. It also provides important guidance on when summary judgment is appropriate in the District under either doctrine.



damages and those funds remain available. The CSA left unclear whether "available funds" means any funds in a school board's coffers, any funds left in the construction account, contingency funds, or something else. In the BEKA case, the school board has taken the position that once the construction funds are depleted, the contractor is out of luck; regardless of how those funds have been spent and to whom those funds have been paid. Payment is, essentially, on a "first come, first served" basis, and the school board has taken the position that it has no obligation to expend contingency funds or to transfer funding from other sources to cover a judgment in favor of a contractor.

Unfortunately, the Court of Special Appeals got the decision wrong. Simply stated, the Court of Special Appeals' analysis and application of the doctrine of sovereign immunity commenced in the wrong place. The Court of Special Appeals commenced its analysis of the sovereign immunity issue assuming that the Board possessed sovereign immunity from suit in contract. Had the Court examined the history of the doctrine of sovereign immunity in Maryland as applied to local boards of education, it would not have made this critical misassumption. In *Bolick v. Bd. of Educ. of Charles County*, 256 Md. 180, 183, 260 A.2d 31 (1969) and *Bd. of Educ. of Charles County v. Alcrymat Corp. of Am.*, 258 Md. 508, 512, 266 A.2d 349 (1970), Maryland's highest appellate court clearly stated that local boards of education do not enjoy the defense of sovereign immunity in actions brought against them based upon written contracts.

Therefore, the Court of Special Appeals should have commenced its analysis of the sovereign immunity issue with the understanding that the Board did not possess sovereign immunity in actions based upon a written contract. The Court of Special Appeals erroneous assumption that the Board possessed the right to assert the defense of sovereign immunity in contract actions derailed its entire opinion and rendered it in error.

What the CSA's decision means to all contractors who do business with school boards is that there is no guarantee of payment to contractors for either the original contract sum or for change orders or delay damages. There is no guarantee of payment to subcontractors if a valid "pay if paid" or "pay when paid" clause exists in the subcontract, or if the subcontractor has agreed to pass all claims through to the government owner. Further, there is no guarantee that sureties can recover funds from school boards if they step into the shoes of the contractor.

Contractors in the region have already said that the CSA's decision will have a significant chilling effect on the business of school construction in Maryland — and undoubtedly elsewhere. The scope of the CSA decision is so broad as to include not only change order work and contractor claims, but also contract work as well. Under the CSA's decision, a county school board could either negligently or intentionally re-allocate funding away from a school construction project to some other project or purpose. More troubling, even if a contractor were to properly and timely complete a school construction project, and comply with all contract terms and specifications,

School Board Immune from Suit When No "Available Funds"

On February 26, 2010, the Maryland Court of Special Appeals (CSA), Maryland's intermediate appellate court, issued a decision in which it held that a school board is immune from suit and therefore has no obligation to pay a contractor for agreed extra work, additional services, delay damages, and even a remaining contract balance on a written contract, if there is no appropriation remaining to cover the contractor's claim. The case is reported as *Board of Education of Worcester County v. BEKA Industries, Inc.*, 190 Md.App. 668, 989 A.2d 1181 (2010).

According to the CSA, there is no guarantee of payment of a claim against a school board — even one arising from a written contract — unless funds have been appropriated for the payment of such

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SPOTLIGHTS CONTINUED

a school board under this decision could simply move money to a different account and then, pointing to this case, assert that the contractor has the burden of proving that the school board has money. This is not what the legislature has said, and this case should not stand.

Following the BEKA decision, the affected contractor petitioned Maryland's highest court for certiorari. The petition for certiorari was granted, briefs have been filed, and the case will be heard in the high court on December 7, 2010.


Plaintiff's Expert Nurse Ilene Warner-Maron Stricken as a "Professional Witness"

In 2009, the family members of a deceased nursing home resident filed a wrongful death and survival action in the Circuit Court for Caroline County, Maryland. *Jump v. Ruxton Health of Denton*, Case No. 05-C-09-12892. One of the Plaintiffs' standard of care experts, Nurse Ilene Warner-Maron, signed a Certificate of Qualified Expert pursuant to Maryland Code, Courts & Judicial Proceedings Article, Section 3-2A-04 attesting to various alleged deviations in the applicable standards of care. Included within the Certificate was the necessary statutory language stating that she did "not devote annually more than 20 percent of the expert's professional activities to activities that directly involve testimony in personal injury claims." *Md. Code, CJP, § 3-2A-04*.

During discovery, Nurse Warner-Maron was deposed. She conceded at deposition that thirty (30) to forty (40) percent of her business relates to litigation matters and that this percentage was actually down from the fifty (50) percent litigation work she had been doing in the last several years. When pressed, she admitted to reviewing on average fifteen (15) new cases per month and had reviewed thirty (30) to forty (40) cases for Plaintiff's counsel alone. This expert review work was in addition to her actual deposition and trial testimony, which from 2007 through August 2010, consisted of seventeen (17) trials and sixty four (64) depositions (or 2.5 times per month on average in court or at deposition). Further still, while Nurse Warner-Maron produced her list of trials and deposition testimony as an exhibit at her deposition, she revealed that she maintains a second list that she would not disclose because it contained all of the cases she has reviewed for litigation purposes and rejected or otherwise had not provided deposition or trial testimony.

Armed with her deposition testimony, a Motion to Strike Nurse Warner-Maron was filed and argument heard on the first day of trial. The Honorable Judge Dale R. Cathell ultimately struck her as a professional witness in violation of the 20% rule set forth *supra*. In reaching that determination, Judge Cathell applied the test articulated by the Maryland Court of Appeals in *Witte v. Azarian*, 369 Md. 518, 801 A.2d 160 (2002) which defined the term "directly involving testimony" to include, in addition to actual testimony, (1) the time the doctor spends in, or traveling to and from, court or deposition for the purpose of testifying, waiting to testify, or observing events in preparation for testifying, (2) the time spent assisting an attorney or other member of a litigation team in development or responding

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to interrogatories or other forms of discovery, (3) the time spent in reviewing notes and other materials, preparing reports, and conferring with attorneys, insurance adjusters, other members of a litigation team, the patient, or others after being informed that the doctor will likely be called upon to sign an affidavit or otherwise testify, and (4) the time spent on any similar activity that has a clear and direct relationship to testimony to be given by the doctor or the doctor's preparation to give testimony. Judge Cathell also relied up the recent case of *University of Maryland Med. Sys. Corp v. Waldt*, 411 Md. 207, 983 A.2d 1112 (2009), in which the Maryland Court of Appeals examined the legislative intent behind the "20 percent rule" and struck an expert who it deemed to have devoted 20.66% of his professional time to activities directly involving testimony. Id.

The case proceeded to trial with another standard of care expert designated by the Plaintiff and after four days of testimony, the jury returned a defense verdict finding the Defendant and its staff complied with all applicable standards. In the days following the decision, Plaintiffs' counsel advised his client would be filing an appeal.

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SPOTLIGHTS CONTINUED

Successful Defense of Negligence Claims Against Maryland General Hospital by Chris Daily and Mark Coulson of Miles and Stockbridge

On October 6, 2010, **Chris Daily** and **Mark Coulson** of Miles & Stockbridge successfully defended Maryland General Hospital in the Circuit Court for Baltimore City in a case claiming that the Hospital's Emergency Department Staff was negligent in not appreciating the plaintiff's psychiatric issues and instituting appropriate precautions to prevent the plaintiff from eloping from the Emergency Room. The plaintiff jumped from the Howard Street Bridge a short time later and sustained significant injuries.

Plaintiff claimed that given his extensive psychiatric history (including previous ER visits and admissions to Maryland General), together with his current symptoms, the doctors and nurses should have been on notice that he was a flight risk. The record established that at the time of the visit, plaintiff had been off of his medication for several days and allegedly had not slept or eaten. There was conflicting testimony regarding whether plaintiff was having auditory hallucinations at the time of his visit, and also conflicting evidence as to exactly what psychiatric information was relayed by the family members accompanying plaintiff. Plaintiff's experts claimed that taken as a whole, these facts should have led the doctors and nurses to conclude that plaintiff was a danger to himself and a potential flight risk, mandating at a minimum that the ER provide a "sitter" to make sure plaintiff did not leave. Moreover, they argued that plaintiff was allegedly showing signs of increased agitation as his length of stay progressed. Plaintiff had been in the ER approximately three and a half hours at the time of his elopement. His injuries included multiple fractures and an extended stay at Shock Trauma. He also claimed future care damages as well as noneconomic damages.

The Hospital's staff and experts argued that despite his psychiatric history, plaintiff was cooperative at the time of his assessment and did not show signs that he was a danger to himself. They also pointed to plaintiff's own testimony that at the time he left the ER, he did not intend to hurt himself and simply was walking home (albeit in a hospital gown in December) to his house in Remington. According to plaintiff, he jumped from the bridge to evade police who had been summoned by the Hospital when they discovered plaintiff had left.

Mark and Chris filed a motion for summary judgment arguing, among other things, that there was no causation because even if Plaintiff had given notice of his elopement, the ER staff could not have legally restrained him. They also argued that plaintiff's decision to jump from the bridge due to the arrival of police was a superceding intervening cause, and that plaintiff was contributorily negligent and/or assumed the risk by jumping from the bridge. Although the Court heard argument on the motion on the first day of trial, it was not until the second day of trial after jury selection and rulings on motions in limine that the Court, on its own motion pursuant Rule 2-502 entered judgment for the Hospital, finding that because the Hospital had no authority to hold Plaintiff, no tort duty could be created.

The following are excerpts from *The Funk & Bolton Mid-Atlantic Property & Casualty Reporter*, November 2010, Jennifer S. Lubinski, Christopher W. Poverman, Mary E. McGrath

Third Circuit Holds That FCC Regulations Preempt State Tort Liability for Cell phone Related Injuries

In a decision favorable to the cell phone industry, the Third Circuit has ruled that lawsuits against cellular companies are preempted by regulations propounded by the Federal Communications Commission (the "FCC").

In *Farina v. Nokia, Inc.*, 51 Comm. Reg. (P&F) 955, decided on October 22, 2010, the Court was asked to decide whether a class of plaintiffs, made up of Pennsylvania cell phone users, could sue cellular companies for exposing them to allegedly unsafe levels of radiofrequency ("RF") radiation. They claimed that the use of cellular phones without headsets created health risks, that companies were aware of these risks and failed to respond, and that the companies were in violation of state warranty law.

The Court rejected the claim because it found that the action was preempted by FCC regulations concerning wireless phones. The FCC oversees cellular communications much as it regulates radio transmissions to ensure that the system is efficient and to permit

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2010 Past Presidents Reception, September 15, 2010



SPOTLIGHTS CONTINUED

service providers to comply with uniform national standards rather than a patchwork of state regulations. The FCC has regulated RF emissions since 1985. Regulations in place since 1996 limit exposure to RF emissions.

The Supremacy Clause of the United States Constitution invalidates any state law that conflicts with or is contrary to federal law. State law may be preempted by federal law in several ways: express preemption, where Congress specifically states in legislation that the law preempts state law on the issue; field preemption, where federal law so completely occupies the field that state laws dealing with the same field are invalid; and conflict preemption, where compliance with both state and federal law would be impossible or where state law stands as a barrier to compliance with federal law.

The Third Circuit held that the FCC had carefully balanced the risks of RF emissions with the need for rapid, dependable, efficient and accessible wireless service throughout the country. To allow Pennsylvania law to apply would invalidate the FCC's risk/benefit analysis. Accordingly, the Court held, state tort and warranty law concerning RF emissions was preempted by the FCC regulations on RF exposure.

Proposal to Increase Jury Trial Threshold Approved by Maryland Voters

On November 2nd, Maryland voters were asked to decide whether the threshold for the right to jury trial should be increased from \$10,000 to \$15,000. Although the threshold had been increased only a few years ago, voters resoundingly approved Question 2 on the Maryland ballot.

The law is not yet effective, and will not become effective until Governor O'Malley "proclaims" the amendment passed. Once the change becomes effective, it will apply only to lawsuits filed on or after the effective date, regardless of when the accident or injury giving rise to the lawsuit occurred.

The district court in Maryland is a court of limited jurisdiction. All cases are tied to the bench. Discovery in civil cases is limited to

fifteen interrogatories, which can make it difficult to fully investigate the plaintiffs claims. However, the measure was supported by the local small business community because it would permit quicker, less expensive resolution of claims worth up to \$15,000.

Maryland Rules Committee to Consider Abandoning — Contributory Negligence Doctrine in Favor of Comparative Negligence

The Chief judge of the Maryland Court of Appeals made a surprise announcement on November 21, 2010 that the Rules Committee will study the "feasibility" of moving from the contributory negligence standard to a comparative negligence system.

The General Assembly previously considered, but rejected, the change, despite significant pressure by the plaintiffs' bar. Under the contributory negligence standard, if a defendant can establish that a plaintiff contributed even slightly to his or her own injury, the plaintiff is barred from recovery as a matter of law. The defense has frequently been the basis of motions for summary judgment, especially in slip and fall, and similar cases. Under a comparative negligence approach, however, the plaintiff would be entitled to recover based on the "portion" of the accident for which he or she is not responsible.

Maryland is one of only a few states in the country to maintain the contributory negligence defense, along with other related common law concepts such as joint and several liability.

The Rules Committee is a group of attorneys and judges who study and write the Rules of Procedure. It is extremely unusual for the Committee to be asked to develop what would be an enormous change to existing law. Ordinarily the Committee addresses issues such as timelines for filing pleadings and other non-substantive procedural rules.

The Rules Committee is currently seeking input from several local bar associations, including Maryland Defense Counsel, Inc., which has historically opposed conversion to a comparative negligence scheme.

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