legal briefs

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A Newsletter for the Clients of RSR&M, L.L.C.

Liability & Coverage Decisions

Court of Appeals Affirms That The Non-Economic Damages Cap is Constitutional & Holds that Eyewitnesses Are Not Required for a Conscious Pain and Suffering Claim

The Maryland Court of Appeals ("COA") recently upheld Maryland's statutory cap on non-economic damages (Md. Code Ann., [Ct. & Jud Proc.] §11-108 (2008 Repl. Vol.)) in the case of DRD Pool Services, Inc. v. Freed, *et al.*

On June 26, 2006, Connor Freed, a five-year-old boy, and son of Thomas Freed, visited the Crofton Country Club swimming pool with a family friend, Paul Carroll and two other children. At some time between 4:15 p.m. and 4:30 p.m., Connor left the water to use the restroom. Connor was instructed by Mr. Carroll to return to him after he was finished in the restroom. When Connor failed to return, Mr. Carroll sent another child into the restroom to look for Connor. At around that same time, Connor was discovered floating face down in the pool. Emergency personnel attempted lifesaving measures, but Connor never regained consciousness.

Connor's parents filed suit against DRD Pool Services ("DRD") alleging negligence by DRD in maintaining the pool. Thomas Freed, as the representative for Connor's estate, sought damages for conscious pain and suffering on Connor's behalf and Thomas and Deborah Freed sought monetary relief on the basis of their wrongful death claim.

After discovery was completed as to fact and expert witnesses, DRD filed a motion for summary judgment as to the claim for conscious pain and suffering. DRD argued that because there were no eyewitnesses to Connor's drowning, the claim for conscious pain and suffering was not supported by any objective evidence. The Freeds argued that their expert testified to a reasonable degree of medical certainty that Connor experienced pain and suffering during the approximately two and a half minutes it takes for a five-year-old to lose consciousness as a result of drowning.

After a hearing in the Circuit Court, the trial judge granted DRD's motion for summary judgment. The trial judge held that it was undisputed that Connor was conscious for some period of time, but pointed to case law that required a showing, by some objective measure, that the decedent was conscious of the pain and suffering before the claim may be submitted to the jury. The Circuit Court held that because there were no eyewitnesses to say when Connor became unconscious, there was no objective measure of Connor's conscious pain and suffering that would allow the jury to consider the issue. Proceeding solely on the wrongful death claim, the jury found DRD negligent and awarded the Freeds $4,006,442.00. Pursuant to the statutory cap on non-economic damages in Maryland, the award was reduced to $1,002,500.00.

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Court of Special Appeals Clarifies Burden of Proof in WCC Cases Where Causal Connection is at Issue

In Wilson v. Shady Grove Adventist Hospital, 191 Md. App 569 (2010), the Court of Special Appeals of Maryland articulates the burden of proof in workers' compensation cases where the issue is causal connection. Writing for Maryland's intermediate appellate court in its March 31, 2010, opinion, Judge Arrie W. Davis cites Comment B ("Nexus or Proximate Cause") to Maryland Civil Pattern Jury Instruction 30:6 ("Arising Out of and in the Course of Employment"):

> The nexus or proximate cause requires that: (a) the injury could have been caused by the incident; and (b) no other efficient cause intervened between the incident and the result.

Shannon Wilson was working as a psychiatric technician for Shady Grove Hospital on July 14, 2006, when he fell and injured his right knee. He eventually underwent right knee surgeries in November 2006 and June 2007. There was apparently no dispute as to the employer/insurer's liability for the claimant's right knee injury as of May 2007, the time at which Mr. Wilson's left knee first became symptomatic. Shady Grove denied liability for the left knee condition.

The Maryland Workers' Compensation Commission heard the case and found in the claimant's favor that the "disability of [appellant's] left knee and medical treatment is causally related to the [July 14, 2006] accidental injury." The claimant testified that the immobilization of his right knee from wearing a right knee brace caused him to favor his left leg, which caused the left knee pain. The hospital appealed and, after a two-day jury trial in the Circuit Court for Montgomery County, the court reversed the Commission. The claimant appealed that decision to the Court of Special Appeals.

The trial court, according to Mr. Wilson, erred in instructing the jury on the law of proximate causation in a workers' compensation case. Over claimant's objection at the conclusion of evidence during the jury trial, the Circuit Court instructed the jury that "[i]n this case causation means that [appellant's] work related injury of July 14, 2006, to his right knee, is a cause of the condition of his left knee."

In reversing the Circuit Court and finding in favor of the claimant, the Court of Special Appeals expressly determined that the "causation standard is broader in workers' compensation cases" relative to negligence cases. The trial court did not properly instruct the jury on the causation issue, which "went to the heart of the only issue submitted to the jury," according the Judge Davis, and prejudiced the claimant in doing so. Continuing, the appellate court explained that the employer/insurer, having lost at the Commission level, had the burden to prove at the Circuit Court level that the 2006 right knee injury could not have caused the left knee condition or that there was another intervening cause.

Article contributed by Paul Donoghue

ALCHEMY IN THE CIRCUIT COURT FOR BALTIMORE CITY

Allen v Dackman

The Limits of Limited Liability Companies

Despite the best efforts of the Defense Bar, the process of turning lead into gold continues in the courtrooms of Baltimore City. The recent opinion in Allen v. Dackman, 413 Md. 132, 991 A.2d 1216 (2010), is a case in point.

The case of Allen v. Dackman is a cautionary tale for any member of a limited liability company. Hard Assets, was a limited liability company that had acquired a distressed property at a tax sale, hoping to resell it at a profit rather than keep it as a rental unit. Jay Dackman, a member of Hard Assets, had never visited the property prior to the tax sale purchase and was told by the former owner that it was vacant.

As it turned out, a mother and her two daughters were illegally residing in the property. They were not paying rent and Hard Assets promptly ordered them to leave, but the squatters failed to comply.

Eventually, a forcible entry and wrongful detainer complaint was filed against the occupants and judgment was entered in Hard Assets' favor. A petition for warrant of restitution was filed, and the occupants were forcibly removed from the property, having never paid a penny of rent to Hard Assets during the seven months that they illegally occupied the home.

Having rid himself of these unwanted tenants, Mr. Dackman no doubt heaved a sigh of relief at the prospect of unburdening himself of this particular property when it was sold. However, the story did not end there, because the unwanted tenants were back. . .with a lawsuit alleging, among other things, Mr. Dackman's personal liability for the children's lead poisoning.

This contention did not pass muster in the trial court and a defense motion for summary judgment was granted. The Court of Special Appeals saw it the same way and ruled that Mr. Dackman could not be personally liable during the period of time title to the property was held by the limited liability company, Hard Assets.

The Court of Appeals, however, mixed a liberal dose of the Baltimore City Housing Code with a dash of common law to find that the limited liability of a member of a limited liability company was not so limited after all. The Court reversed the Court of Special Appeals and the trial court's granting of summary judgment and held that "a reasonable trier of fact could find that [Jay Dackman] personally committed, inspired, or participated in the tort alleged in this case . . ." This, despite the fact that the previous owner had told him that no one lived at the property, he had never intended to rent the property to anyone, the squatters were living at the property without any legal right to possession and Dackman had not inspected the property before he purchased it or immediately afterwards.

Thus, Mr. Dackman's adventures in the land of lead paint litigation are apparently destined to continue, returning once again to the point of beginning, before a jury of his peers in the Circuit Court for Baltimore City.

What effect the telling of this tale will have on a Baltimore City jury is a fruitful field for speculation.

Article contributed by Dennis Whelley

Court of Appeals Affirms That The Non-Economic Damages Cap is Constitutional & Holds that Eyewitnesses Are Not Required for a Conscious Pain and Suffering Claim

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The Freeds filed an appeal to the Maryland Court of Special Appeals ("COSA") regarding the granting of summary judgment and the constitutionality of the non-economic damages cap. The COSA held that direct evidence such as eyewitness testimony is not required in order to submit the issue to the jury. It also rejected the Freeds' arguments that the non-economic damages cap is unconstitutional. The COA granted *certiorari* on both issues.

The COA affirmed the COSA's ruling that the issue of Connor's conscious pain and suffering should have gone to the jury. In Maryland, a plaintiff must establish three elements in order to recover for conscious pain and suffering: (1) the defendant's negligence was the direct and proximate cause of the accident; (2) the deceased lived after the accident; and (3) between the time of the accident and the time of death, the deceased suffered conscious pain. The COA concluded in this case that autopsy reports and expert testimony may be sufficient evidence to infer conscious pain and suffering in drowning cases, and that eyewitness testimony is not required.

The COA also affirmed the COSA's ruling that the Freeds had not made a showing that the COA should reject its earlier precedent regarding the constitutionality of the non-economic damages cap.

The Freeds argued that the non-economic damages cap restricted full access to "redress for injury and trial by jury." The COA stated that the non-economic damages cap did not abolish a plaintiff's cause of action based on negligence but simply modified the law of damages to be applied. Additionally, the right to a jury trial is unaffected by the non-economic damages cap. Plaintiffs still have the right to have a jury determine the facts and assess liability.

Article contributed by Andrew Nichols

RSRM Associate Dee Drummond Featured in Daily Record

Congratulations to RSRM Associate, Dee Drummond, who was the subject of an August 8, 2010, article in the *Maryland Daily Record* regarding his service as the Chief of the International and Operational Law Section in Afghanistan from March 2008 to June 2009. As the Chief of the International and Operational Law Section in Afghanistan, Dee's job was to help commanders interpret the Rules of Engagement (ROE). The ROE are directives issued by competent military authority that delineate the circumstances and limitations under which United States Military forces will initiate and/or continue combat engagement with other forces they encounter. Stated plainly, Dee advised the Commanding General and his staff on when U.S. forces could and should shoot or drop bombs and when U.S. forces should show restraint.

As the Chief of the International and Operational Law Section, Dee was tasked with reviewing each offensive military operation to determine whether that operation complied with the applicable rules of engagement and the international laws of armed conflict. Dee was asked daily to opine on when and where U.S. forces could engage targets.

Dee left active duty in December 2009 just prior to joining RSRM, but continues to serve in the Army JAG Reserves.

Venue Shopping by Plaintiffs' Attorneys

It is not uncommon to see plaintiffs' attorneys file suit in the Circuit Court for Baltimore City in cases where the accident or alleged tort occurred in another county or venue. Plaintiffs' attorneys prefer Baltimore City, as it is one of the most plaintiff-oriented venues in Maryland.

It important to ensure that all of the facts surrounding the underlying claim are readily available, including the location of the accident and the addresses of the parties. So far in 2010, attorneys at RSRM have been successful in getting nearly a dozen cases transferred out of Baltimore City to more conservative venues by filing Motions to Transfer Venue For *Forum Non Conveniens*.

The Courts look at several factors, including public and private interests of judicial fairness in the interest of justice. These include the relative ease of access of witness, the sources of proof, availability of compulsory process for attendance, the cost of obtaining attendance of witnesses, possibility of a view of the accident scene and all other practical problems that make a trial of a case easy, expeditious, and inexpensive. The Maryland appellate courts have held that a Court considering a Motion to Change Venue must consider, among other things, considerations of court congestion, the burden of jury duty and the local interest in the matter. Jury duty, the Court of Appeals has stressed, is a burden that should not be imposed upon the people in a community which has no interest or relation to the litigation.

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Rollins, Smalkin, Richards & Mackie, L.L.C. has been a Maryland-based litigation firm for over 90 years. The firm's main office is an historic four story building in Baltimore's center city. Please contact Andrew T. Nichols at (410) 727-2443 if you require any clarification or additional information concerning the contents of this newsletter.

This newsletter is provided for informational purposes only. Every effort has been made to ensure accuracy, but the contents of the newsletter should not be construed as legal advice, which, of necessity, must relate to specific advice, which, of necessity, must relate to specific factual situations and claims. You are urged to consult with counsel concerning your situation and any specific questions that you may have.

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