



legal

briefs

Winter 2011

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

Liability & Coverage Decisions

Diminution of Value: The Wild, Wild West of Motor Vehicle Damages Claims

Your insured is involved in a motor vehicle accident that was her fault. Fortunately, there were no injuries, however, the claimant's vehicle sustained moderate property damage. You agree to pay for the damage to the claimant's vehicle, cut the check and send it out. Case closed? Not so fast! More and more individuals are retaining the services of so called "experts" in the field of diminution of value to assert claims, many in the amount of several thousand dollars or more, even after the damaged vehicle has been fully repaired.

Diminution of value claims typically consist of two elements. The first element involves arguments that the repairs were performed poorly or by using after-market parts. The second element of diminution of value claims involves "inherent" diminution of value. The theory underlying this argument is that, even though the damaged vehicle has been fully repaired, its resale value has been adversely affected based solely on the fact that it has been involved in an accident. The argument continues that either state law requires one to disclose that his or her vehicle has been involved in the accident (not the case in Maryland, however, a false response to an inquiry about prior accidents may be actionable) or that there are resources readily available to prospective purchasers such as "CarFax" to ascertain whether or not a vehicle they wish to purchase was previously involved in an accident.

More and more states recognize inherent diminution of value as an element of damages. In Fred Frederick Motors,

Inc. v. Krause, 12 Md. App. 62 (1971), Maryland's Court of Special Appeals recognized diminution of value as an element of damages in addition to repair costs "provided that the two together do not exceed the diminution in value prior to the repairs." Id. at 67. Interestingly, Fred Frederick Motors involved vehicles owned by a car dealership that were damaged when a tractor-trailer ran off the road and struck the vehicles. Diminution of value could be readily proven because the vehicles were held for sale and could no longer be sold as new vehicles.

The difficulty for most claimants and their attorneys is that the vehicles damaged are not typically for sale, nor have they been sold by the time of trial. Further, if the vehicle had been sold prior to trial, presumably, the claimant would have to call the purchaser to trial to testify that he purchased the vehicle for a lower price than he would have if the vehicle had not been involved in an accident.

To get around these issues, many individuals retain diminution of value "experts," typically, former automotive mechanics, to prepare reports calculating the amount of inherent diminution of value related to the fact that the vehicle, though fully repaired, had previously been involved in an accident. In most cases, the use of such experts if challenged correctly is an error fatal to the claimant's case.

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ROLLINS, SMALKIN, RICHARDS & MACKIE, L.L.C.
a general civil and trial practice

Court of Special Appeals Expands Venue for Workers' Compensation Appeals

In *LeCronier v. United Parcel Service*, 196 Md. App. 131, 7 A.3d 1106 (2010), the Court of Special Appeals held that on an appeal from a decision of the Maryland Workers' Compensation Commission ("Commission"), venue is proper in the county where the claimant works, as well as where he lives or was injured.

Writing for Maryland's intermediate appellate court, Judge Kehoe broadened the basis for venue for parties that appeal decisions from the Commission. The Claimant, a tractor-trailer driver for United Parcel Service ("UPS"), lived in Anne Arundel County and was injured in Delaware. The Commission denied the Claimant's claim for workers' compensation benefits and the Claimant appealed the Commission's decision to the Circuit Court for Baltimore City. UPS filed a motion to transfer for improper venue relying upon, as a practical matter, Labor & Employment Article § 9-738, which provides that a person shall file an appeal in a county "that has jurisdiction over the person" or in the county "where the accidental personal injury... occurred."

The Circuit Court for Baltimore City granted UPS's motion and transferred the case to the Circuit Court for Anne Arundel County where a jury affirmed the Commission's decision in favor of UPS. The Claimant

appealed the jury's decision to the Court of Special Appeals, arguing that venue was proper in the Circuit Court for Baltimore City and that the court erred in granting UPS's motion to transfer. The Court of Special Appeals agreed with the Claimant, vacated the judgment of the Circuit Court for Anne Arundel County and ordered that the case be remanded for transfer back to the Circuit Court for Baltimore City for a new trial.

Judge Kehoe explained that Labor & Employment Article § 9-738 must be read in conjunction with Maryland's general venue statute, Cts. & Jud. Proc. Article § 6-201(a), which provides, in part, that a civil action shall be brought in a county where the defendant resides, carries on regular business, is employed, or habitually engages in a vocation. Judge Kehoe reasoned that the General Assembly intended that a person who files an appeal from a decision of the Commission could file an appeal in the county in which the person was employed or lived, in addition to the county where the accident took place.

Article contributed by Paul Donoghue

Please Note the Following Changes to Benefit Rates for Maryland Workers' Compensation Claims for 2011

Maryland Workers' Compensation Benefit Rates for 2011

State Average Weekly Wage	\$940.00
First Tier PPD	\$157.00
Second Tier PPD	\$314.00
Serious Disability	\$705.00



What to Know When a Criminal Case and Your Civil Case Originate From the Same Set of Facts

Whether the attorneys at RSRM are handling an automobile negligence case or a business dispute, there are times when our civil representation of a client has a criminal component. The long-standing rule in Maryland is that evidence of a criminal conviction that stems from the same incident that gives rise to a civil suit is not admissible in the subsequent civil trial. Aetna Casualty & Surety Company v. Kuhl, et al., 296 Md. 446, 450 (1983). This rule is often forgotten or overlooked.

1. Evidence of a Criminal Traffic Violation May (or May Not) Be Admissible in Automobile Tort Case.

Did the client pay the traffic ticket, plead guilty or request a trial? Admissibility may depend on how the client is found guilty of the traffic infraction. Payment of a traffic fine is a person's consent to a conviction, not a guilty plea, and is therefore not admissible to prove liability. Briggeman v. Alpert, 322 Md. 133, 137 (1990). A defendant who pleads *nolo contendere* may avoid the admissibility of his plea. Id., at 135. However, a guilty plea to a traffic citation in open court is admissible. Id., at 139.

2. Evidence of a Criminal Charge Dismissal is Not Admissible.

In State Farm Fire & Casualty Co. v. Carter, 154 Md. App. 400 (2003), the insured (Carter) filed suit against his insurance company for breach of contract when it refused to pay a claim arising from an alleged auto theft. At the trial, the Circuit Court allowed evidence that the State dismissed criminal charges against Carter for making a false statement to a police officer and insurance fraud in a criminal case involving the same facts. Carter prevailed in the civil trial before the Circuit Court. The Court of Special Appeals reversed the Circuit Court, holding that evidence of the State's dismissal of the related criminal charges should not have been admitted. The Court of Special Appeals explained that the dismissal of a criminal case is ultimately based on the prosecutor's subjective opinion and has no relevance in a civil trial.

3. Make Sure the Client Reviews His or Her Testimony in the Criminal Proceeding Before Testifying in the Civil Trial.

Under Maryland law, records from a criminal case are not admissible as evidence in a civil case arising from the same facts. United States v. Burns, 103 F. Supp 690 (1952). However, as defense counsel, we must ensure that the client is intimately familiar with his or her criminal statement of facts and/or testimony from the criminal proceedings, as this testimony can be used to impeach any inconsistent testimony given in a civil case.

4. Judicial Estoppel and Admissions Against Interest

Judicial estoppel will apply to prevent the defendant from contradicting a prior guilty plea. In Egan v. Calhoun, 347 Md. 72 (1997), John Calhoun pled guilty to the manslaughter of his wife. The evidence of that guilty plea was deemed to be a judicial admission and was therefore admissible in the subsequent civil trial where the jury had to determine whether the murder of his wife was intentional.

A guilty plea to a criminal charge is admissible, but it does not "conclusively establish liability" in a civil proceeding. Brohawn v. Transamerica Insurance Company, 276 Md. 396, 403 (1975). Remember, a guilty plea may be considered an admission and is therefore admissible in the subsequent civil trial of that case. Kuhl, at 455.

During a recent trial in the Circuit Court for Carroll County, **Tom Neary** had the opportunity to argue these issues in a civil case in which the client had been convicted of disregarding a red light and for negligent driving in a prior criminal action stemming from the same accident. Although the trial judge was reluctant to allow it, as the issues disposed of during the traffic court hearing were identical to the issues at the civil trial, he agreed that the Kuhl case was binding precedent and allowed the defense to fully contest liability without mention of the criminal convictions during the civil trial.

Article contributed by Dee Drummond

Diminution (continued from page 1)

Whether an individual state has adopted the Frye standard or the Daubert standard for the admissibility of expert testimony, it is all but impossible for a diminution of value “expert” to satisfy the requirements for his or her testimony to be accepted by a trial court. Maryland utilizes the Frye standard that the expert’s opinions must be based on sound methodology generally accepted in his or her field. Daubert requires that the opinions be based on sound scientific methodology. The problem is that there is no “field” in inherent diminution of value analysis, nor is there any generally accepted or tested methodology utilized by these “experts.”

A thorough *voir dire* of such experts will focus on the fact that there is no national or regional governing body or organization in the area of inherent diminution of value, there are no educational or training requirements, there are no certification or licensing requirements, there are no authoritative treatises, journals or articles in the field, there is no database specific to the sale of vehicles previously involved in accidents but fully repaired, and there are no generally accepted and tested formulas utilized to calculate inherent diminution of value.

In past cases, attorneys from RSRM have utilized cross-examination of inherent diminution of value experts and have been successful in striking the expert’s testimony or having the trial court grant a motion for judgment at the end of the plaintiff’s case. This does not necessarily mean that insurance carriers should deny all claims for inherent diminution of value. In many cases, a fair settlement of such claims will be more cost effective than litigating them. Where, however, a claimant has retained an expert with an inflated claim for diminution of value in a report that does not clearly set forth in a logical and verifiable manner how the expert arrived at his or her figure, the odds are very good that a Maryland court will deny the claim.

Article contributed by James Andersen

Firm News

Circuit Court Grants Employer/Insurer’s Motion for Judgment

In an appeal from the Workers’ Compensation Commission (“Commission”) to the Circuit Court for Prince George’s County, **Andrew Nichols** was successful in getting the Court to grant his Motion for Judgment at the close of all evidence. The Claimant had appealed a decision by the Commission in which the Commission denied past benefits for temporary-total disability, denying the causal relationship of the Claimant’s medical complaints to his original injury, and finding that the Claimant was at maximum medical improvement.

The Court agreed that the Claimant had failed to meet his burden of overcoming the presumption that the Commission’s decision was correct and granted judgment in favor of the employer and insurer. The Claimant filed a Motion for New Trial, alleging that the decision should have been left in the hands of the jury. The Court agreed that where the evidence is not sufficient to generate a jury question and permits only one conclusion, the question is one of law and a motion for judgment must be granted, and denied the Claimant’s Motion for New Trial.

Baltimore City Jury Returns Defense Verdict in Pedestrian-in-Crosswalk Case

Recently, **James Buck** was successful in obtaining a defense verdict from a Baltimore City jury in a case involving a plaintiff pedestrian who was struck by a vehicle operated by the defendant. The issue in the case revolved around an interpretation of several sections of the Transportation Code and how they applied to the case under the circumstances. The parties stipulated that the pedestrian “walk/don’t walk” signal was malfunctioning or disabled, which left a disagreement over which party had the green traffic signal.

Placing the plaintiff’s credibility into question, counsel for the defendant successfully argued that the defendant had the green light and right of way, and that the plaintiff stepped into on-coming traffic. Prior to submitting the case to the jury, the defense was able to exclude a significant number of the Transportation Code sections proposed by the plaintiff based upon an interpretation that, in the event a pedestrian signal is inoperable or unavailable, the standard traffic control signals applied to govern the intersection.

Md. Cts. & Jud. Proc. § 10-104: A Bell You Can't "Un-Ring"

As defense counsel, the attorneys of RSRM are often presented with the issue of whether to pray a given case up from the District Court to the Circuit Court, and must take into account the variety of factors and circumstances inherent in each case. One of the most important factors to consider is the amount of exposure the client faces with regard to a potential judgment. At the District Court level, the maximum exposure possible is the current jurisdictional limit of \$30,000. Generally speaking, there is no such cap at the Circuit Court level. There is an exception to the general rule, however, depending on whether the plaintiff in the lower court opted to use the Maryland Courts & Judicial Proceedings Article § 10-104 mechanism to introduce medical records. Under Maryland law, if a party files the requisite notice of intention to rely on the Article, that party is then bound to the jurisdictional cap of the District Court, even if the case is transferred to the Circuit Court. In other words, once the plaintiff rings the 10-104 bell, it can't be "un-rung."

The 10-104 Article allows a party to introduce the records of a health care provider without the otherwise necessary testimonial support of that provider, as long as certain conditions are met and procedural steps taken. Specifically, the Article states in part:

A writing or record of a health care provider described in this section is admissible under this section if:

- (i) The writing or record is offered in the trial of a civil action in the District Court or a circuit court;
- (ii) At least 60 days, except as provided in paragraph (2) of this subsection, before the beginning of the trial, the party who intends to introduce the writing or record:
 1. Serves notice of the party's intent to introduce the writing or record without the support of a health care provider's testimony, a list that identifies each writing or record, and a copy of the writing or record on all other parties as provided under Maryland Rule 1-321; and
 2. Files notice of service and the list that identifies each writing or record with the court; and
- (iii) The writing or record is otherwise admissible.

Typically, the trial in a District Court case is scheduled sixty days out from the date of filing, so most plaintiffs' attorneys file the required 10-104 Notice contemporaneously with the Complaint, or very soon thereafter. This allows ample time for the defendant to decide whether to file a jury trial prayer, which transfers the matter to the Circuit Court.

In the event that a case is prayed up to the Circuit Court, if the plaintiff below submitted a 10-104 Notice pursuant to the Article, that plaintiff is then barred from amending his *ad damnum* (claim for damages) in the Circuit Court beyond the jurisdictional limit of the District Court. This bright-line rule was stated by both of Maryland's appellate courts in the case of Butler v. James, in the Court of Special Appeals, and then the subsequent appeal of that decision to the state's highest court, the Court of Appeals, in the case of James v. Butler.

Butler v. James began in the in District Court for Prince George's County, where the plaintiff originally filed suit, however, the case was removed to the Circuit Court upon the defendant's request for a jury trial. The plaintiff had filed a Notice of Intent to Rely on Md. Cts. & Jud. Proc. §10-104, which was admitted to the Circuit Court as part of the District Court record. The issue in that case arose when the jury returned a verdict far greater than the \$25,000 jurisdictional limit, which was the cap at the time. This unexpected verdict prompted the plaintiff to amend his *ad damnum* clause to receive the higher award, which, over objection, the trial court judge allowed.

On appeal, the Court of Special Appeals reversed the lower court, holding: (1) that the Article by its plain language limited the plaintiff's recovery to the District Court jurisdictional cap once the plaintiff relied on it; and (2) that "estoppel by pleading" precluded the plaintiff from an award in excess of the lower court's jurisdictional limit as a matter of public policy. Butler v. James, 135 Md. App. 196 (2000). In articulating this holding, the court stated:

Although we recognize that the dispositive issue is the legislative intent as gleaned from the enactment of § 10-104 in conjunction with § 4-401, fundamental fairness requires that counsel not be permitted tactically to disarm opposing counsel by resorting to misleading legal maneuvers, particularly when counsel has expressed his objection.

In the course of preparation for trial, it is axiomatic that the nature and degree of preparation is dictated by what counsel perceives is at stake. One may very well be willing to stipulate to the admission of medical evidence pursuant to the provisions of § 10-104 if the only exposure is to an award of \$25,000. On the other hand, in a case in which one must counter the far more persuasive testimony of an expert witness, rather than a cold medical record, the level of preparation could be expected to be much greater.

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Md. Cts. & Jud. Proc. (continued from page 5)

Indeed, the statutory scheme which does not reference any case in which the original exclusive jurisdiction is in the circuit court evinces an intent that § 10-104 be invoked only in small claims involving less serious injuries and smaller potential damage awards. We hold, therefore, that, by proceeding pursuant to § 10-104, independent of the statutory limitation, which we have discussed, appellant is estopped from pursuing damages in excess of that allowed under § 4-401.

The plaintiff below then appealed the decision of the intermediate appellate court to the Court of Appeals, which affirmed, stating “[b]ecause we agree with the Court of Special Appeals as to its first ground of decision [the statutory ground], we do not reach the estoppel issue.” *James v. Butler*, 378 Md. 683 (2003). Because the court did not address the second issue, the holding of the Court of Special Appeals still remains the law in Maryland today.

Article contributed by James Buck