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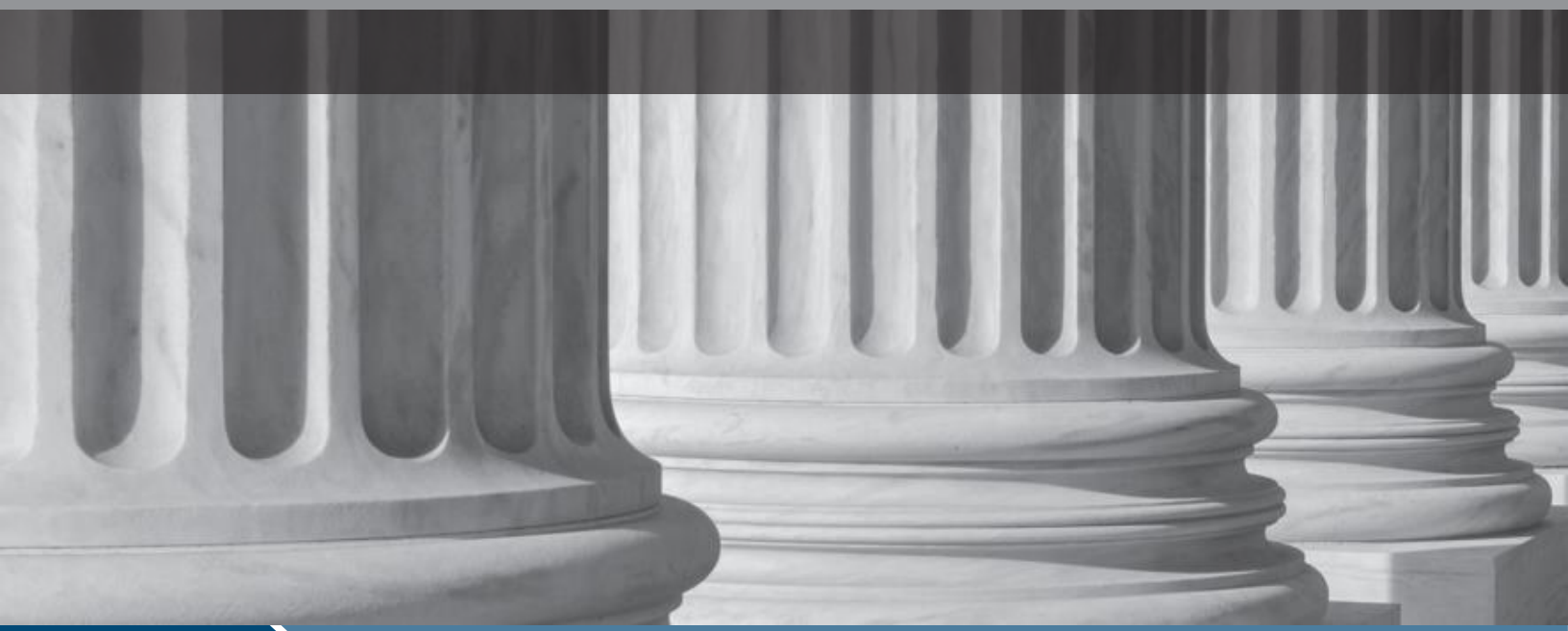

MARYLAND
Tort Profile

The Maryland Tort Law Profile is not intended to provide specific legal advice or opinions, but rather to provide general information. If you need additional information regarding Maryland law, or in relation to a specific claim, please do not hesitate to call upon us. (Revised 3/2021)

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I. OVERVIEW OF THE MARYLAND COURT SYSTEM

A. Trial Courts

1. District Court

The Maryland District Court system is a court where smaller claims are heard by a judge, with no jury trials allowed. There are two separate jurisdictions within the District Court system, the first being small claims court, which is for all claims up to and including $5,000.00, and the second being non-small claims, for all claims above $5,000.00 and up to and including $30,000.00. See Md. Code Ann., Cts. & Jud. Proc. § 4-401. The maximum award in all small claims District Court cases is $5,000.00, or the amount demanded in the Complaint, whichever is less; and the maximum award in all non-small claims District Court cases is $30,000.00, or the amount demanded in the Complaint, whichever is less. Interest and attorneys' fees, if applicable, can be awarded over and above these maximums. The District Courts do not have jurisdiction to render a declaratory judgment. See Md. Code Ann., Cts. & Jud. Proc. § 4-402(c). In District Court cases where more than $15,000.00 is demanded in the Complaint, any party may pray a jury trial thereby transferring the action to the Circuit Court.

District Court is specifically designed to be a streamlined, cost-effective forum to efficiently dispose of smaller claims, with no need for expert medical witnesses, extremely limited discovery and relaxed rules of evidence. There is absolutely no discovery allowed in small claims District Court cases, and the trial of a small claim action is conducted in an informal manner and the rules of evidence generally do not apply. See Md. Rule 3-701. For all non-small claims cases, discovery is generally limited to only fifteen (15) interrogatories. Depositions are extremely rare in the District Court, only being taken either by agreement and stipulation, or by order of court on good cause shown. Live medical experts generally do not testify, instead a party can introduce medical evidence by way of records and reports, and evidence of damages by way of paid bills. Notice of intent to use such evidence must be served and filed at least sixty (60) days prior to trial. **For more information on the Maryland District Court system please log onto www.courts.state.md.us/district/**

2. Circuit Court

The Maryland Circuit Courts are the highest common law and equity courts of record exercising original jurisdiction within the State and the only state forum where jury trials are permitted. The also decide appeals from the District Court, from the orphans' courts in some instances, and from certain administrative agencies. In a civil action in

which the amount in controversy exceeds $15,000.00, exclusive of attorney's fees, if attorney's fees are recoverable by law or contract, a party may demand a jury trial pursuant to the Maryland Rules. See Md Code Ann., Cts. & Jud. Proc. § 4-402(e)(1). In a civil action in which a jury trial is permitted, the jury consists of six (6) jurors. See Md. Code Ann., Cts. & Jud. Proc., § 8-306. A unanimous decision is required.

Full discovery is allowed in Circuit Court, including thirty (30) interrogatories per party, requests for production of documents and requests for admission of facts. The depositions of both parties and non- parties is allowed, in addition to the use of expert witnesses and independent medical examinations. **For more information on Maryland's Circuit Courts please log onto www.courts.state.md.us/circuit.html**

3. Reputation of Jurisdictions in Maryland

Juries in both Baltimore City, and especially Prince George's County, have a reputation for awarding generous plaintiffs' verdicts. Other jurisdictions are known to be more conservative. These include Anne Arundel, Montgomery, Charles, Harford, and Howard Counties. Baltimore County is physically the largest jurisdiction in Maryland, and given its size, has greatly varying demographics which makes it difficult to determinatively describe as either conservative or liberal.

4. Mediation

Pursuant to Maryland Rule 2-504, the circuit courts are permitted to issue scheduling orders which may specifically refer or direct the parties to pursue an available and appropriate form of alternative dispute resolution, but a court may not require the parties to submit to binding arbitration unless they agree in writing or on the record to that process. The courts cannot require a party to participate in a fee-based mediation over that party's objection. See Md. R. 17-202(b)(2). A party has 30 days to file an objection to an order requiring participation in a mediation requiring payment of a fee and if no objection is filed within that timeframe, the order requiring the mediation will stand. See Md. R. 17-202(f)(2).

5. Arbitration

Parties may agree to binding arbitration, with or without a right of appeal. An agreement providing for arbitration under the law of the State confers jurisdiction on a court to enforce the agreement and enter judgment on an arbitration award. See Md. Code Ann., Cts. & Jud. Proc., § 3-202. If appealable, the decision is reviewable only under an abuse of discretion standard and may be reversed only upon a showing that the arbitrator acted capriciously or maliciously. Appellant must show that an award was procured by corruption, fraud, or other undue means, improper influence, obvious partiality, or other means demonstrating the arbitrator's inability to render a

fair and impartial award. See Md. Code Ann., Cts. & Jud. Proc., § 3-224. The Court may correct or modify an award if there is an obvious calculation error or other mistake not going to the merits of the action. See Md. Code Ann., Cts. & Jud. Proc., § 3-223. Such a determination is made without a jury. See Md. Code Ann., Cts. & Jud. Proc., § 3-204.

6. Rules Applicable to Arbitration/Mediation

Parties to an arbitration have a right to be heard, to submit evidence, and cross-examine any witnesses. See Md. Code Ann., Cts. & Jud. Proc., § 3-201 et seq. Arbitrators are not bound by the technical rules of evidence. See Md. Code Ann., Cts. & Jud. Proc., § 3-214(b). Arbitrators have authority to issue subpoenas and administer the oath, and may petition the court to enforce subpoenas. See Md. Code Ann., Cts. & Jud. Proc., § 3- 217.

Whereas arbitration may seem like an attractive alternative to costly litigation, beware of arbitration clauses in contracts which commit parties to arbitrating in distant venues which may also prove to be extremely costly. Individuals should also be very wary of contractual provisions which remove the right of appeal.

B. Appellate Courts

1. The Court of Special Appeals

The Court of Special Appeals is Maryland's intermediate appellate court, which was created in 1966 in response to a rapidly growing caseload in the Court of Appeals. The Court of Special Appeals has exclusive initial appellate jurisdiction over any reviewable judgment, decree, order, or other action of, and generally hears cases appealed directly from the Circuit Court and Orphans' Courts, unless otherwise provided by law. The judges of the Court are empowered to sit in panels of three. A hearing or rehearing before the Court *en banc* may be ordered in any case by a majority of the incumbent judges. To manage civil cases, the Court uses prehearing conferences by which panels of judges attempt to identify those cases suitable for resolution by the parties. As stipulated in Maryland Rule 8-206(a), those appeals either are scheduled for prehearing conference or proceed through the regular appellate process. The prehearing conference may result in settlement of the case, limitation of the issues, remand for additional trial court action or other disposition. An information report or summarization of the case below and the action taken by the trial court is filed in each case when an appeal has been noted, in order to allow for determination as to a prehearing conference. **For more information on the Court of Special Appeals please log on to www.courts.state.md.us/cosalist.html.**

2. The Court of Appeals

The Court of Appeals is the highest tribunal in the State of Maryland and is composed of seven judges. Since 1975, the Court of Appeals has heard

cases almost exclusively by way of certiorari, a discretionary review process. As a result, the Court's formerly excessive workload has been reduced to a more manageable level, thus allowing the Court to devote more time to the most important and far-reaching issues. A party generally may file a petition for writ of certiorari for review of any case or proceeding pending in, or decided by, the Court of Special Appeals upon appeal from the Circuit Court. The Court of Appeals grants those petitions it feels are desirable and in the public interest. The Court also may review cases on writ of certiorari issued on the Court's own motion. The Court of Appeals conducts a monthly review of appellants' briefs from cases pending in the Court of Special Appeals in an effort to identify cases suitable for consideration by the higher court. Certiorari also may be granted in cases that have been appealed to a Circuit Court from the District Court after the initial appeal has been heard in the Circuit Court, in order to obtain uniformity of decisions or where special circumstances make certiorari desirable and in the public interest. **For more information on the Court of Appeals please log on to www.courts.state.md.us/coappeals/index.html.**

II. COMMENCEMENT OF ACTION

A. Venue

A civil action shall be brought in a county where the defendant resides, carries on a regular business, is employed, or habitually engages in a vocation. Additionally, a corporation may also be sued where it maintains its principal offices in the State. If there is more than one defendant, and there is no single venue applicable to all defendants, all may be sued in a county in which any one of them could be sued, or in the county where the cause of action arose. See Md. Code Ann., Cts. & Jud. Proc., § 6-201. Section 6-202 provides additional venues for certain situations including, but not limited to: 1) actions against a corporation which has no principal place of business in the State - where the plaintiff resides; 2) tort actions based on negligence - where the cause of action arose; and 3) action for damages against a nonresident individual - any county in the State. See Md. Code Ann., Cts. & Jud. Proc., § 6-202.

B. Time for Filing an Answer

1. District Court

A Notice of Intention to Defend must be filed within fifteen (15) days after service of the complaint, counterclaim, cross-clam, or third-party claim, except if service is made outside of the state or upon a State agency authorized by statute to receive process. In such a case, the notice shall be filed within sixty (60) days after service. See Maryland Rule 3-307(b). A party may, without filing a Notice of Intention to Defend, appear and seek to defend the action on the day of trial provided that the court is satisfied that the defendant has a valid

defense to the claim. In that event, the court shall either proceed with trial, or upon request of the plaintiff, may grant a continuance for a time sufficient to allow the plaintiff to prepare for trial on the merits. See Maryland Rule 3-306(b)(2).

2. Circuit Court

Pursuant to Maryland Rule 2-321, an Answer must be filed to a complaint, counterclaim, cross-claim, or third-party claim, within thirty (30) days after being served except that:

a. A defendant who is served with an original pleading outside of the state but within the United States shall file an answer within sixty (60) days after being served.

b. A defendant who is served with an original pleading by publication or posting, shall file an answer within the time specified in the notice.

c. An entity required to have a resident agent that is served by service upon the State Department of Assessments and Taxation, the Insurance Commissioner, or some other agency of the State authorized by statute to receive process, shall file an answer within sixty (60) days after being served.

d. The United States, or an officer or agency of the United States, served with an original pleading shall file an answer within sixty (60) days after being served.

e. A defendant who is served with an original pleading outside of the United States shall file an answer within ninety (90) days after being served.

III. COMMON CAUSES OF ACTION

A. Negligence

Negligence is defined as a wrongful act or omission of a duty by the defendant and damage or loss to the plaintiff as a consequence of the defendant's wrongful act or omission. Maryland recognizes the rule of contributory negligence which is extremely rare in the United States. If a plaintiff is found to have contributed in any way to the plaintiff's injuries, the plaintiff may not recover. In theory, if the defendant's negligence is 99.99% of the total negligence comprising the incident, and the plaintiff's negligence is 0.01%, then the plaintiff is not entitled to a recovery. See *Schwier v. Gray*, 277 Md. 631, 357 A.2d 100 (1976). A child is held to the same degree of care as an adult, with the possible exception of children of young and tender age who are held to the standard of conduct of a

reasonable child of the same age, experience, and intelligence as the plaintiff child. See *Taylor v. Armiger*, 277 Md. 638, 358 A.2d 883(1976).

B. Imputed or Vicarious Liability

1. Employer

An employer may be held responsible for the torts of his/her employee under three distinct theories: respondeat superior, negligent hiring, supervision and retention, and negligent entrustment.

a. Respondeat Superior

Under this doctrine, an employer may be held vicariously liable for tortious acts committed by an employee, as long as those acts are within the course and scope of the employment. See *Oaks v. Connors*, 339 Md. 24, 30, 660 A.2d 423 (1995). With respect to the use of motor vehicles, the "right to control" concept controls. The doctrine may only be invoked when an employer has either "expressly or impliedly, authorized the [servant] to use his personal vehicle in the execution of his duties, and the employee is in fact engaged in such endeavors at the time of the accident." *Oaks v. Connors*, 339 Md. 24, 31, 660 A.2d 423 (1995) (citations omitted).

b. Negligent Hiring, Supervision and Retention

In order to establish a claim for negligent hiring, supervision or retention, a plaintiff must prove that the employer of the individual who committed the allegedly tortious act owed a duty to the plaintiff, that the employer breached that duty, that there was a causal relationship between the harm suffered and the breach of the employer's duty, and that the plaintiff suffered damages. See *Penhollow v. Board of Comm'rs*, 116 Md. App. 265, 695 A.2d, 1298 (1997). Where an employee is expected to come into contact with the public, the employer must make some reasonable inquiry before hiring or retaining the employee to ascertain his fitness, or the employer must otherwise have some basis for believing that he can rely on the employee. See *Evans v. Morsell*, 284 Md. 160, 166-67, 395 A.2d 480
(1978).

c. Negligent Entrustment

An employer is subject to liability when he/she allows an employee to use a vehicle, or other chattel, when the employer knows or has reason to know that because of the employee's youth, inexperience, or otherwise, the employee may use the vehicle or chattel in a manner involving unreasonable risk of physical harm to himself and others. See *Herbert v. Whittle*, 69 Md. App. 273, 517
A.2d 358 (1986).

2. Passengers

The negligence of a driver can be imputed to a passenger only if the passenger is also the owner of the car or otherwise was in a position to exert control over the driver. The negligence of a driver can usually be imputed to a passenger that is the owner of the car under the presumption that the owner of the car always retains control over the driver. This presumption can be rebutted. See *Williams v. Wheeler*, 252 Md. 75, 249 A.2d 104 (1969).

A passenger has a right to maintain an action for damages against an owner or operator of an automobile in which he is riding. See *Grossfeld v. Braverman*, 203 Md. 498, 101 A.2d 824 (1954).

3. Parental Responsibility for Children

Generally a parent has no responsibility for the negligent or criminal acts of a child. **(See X. C. Miscellaneous Rules, Minors)**

4. Family Purpose Doctrine

The family purpose doctrine is not applied in Maryland. This means that the head of a family who maintains a car for general family use is not liable for negligence of family members using the car. See *Williams v. Wheeler*, 252 Md. 75, 249 A.2d 104 (1969). However, liability may be imposed upon the head of a family for negligently entrusting the family vehicle to another member of the family. See *Kahlenberg v. Goldstein*, 290 Md. 477, 431 A.2d 76 (1981). But see *Broadwater v. Dorsey*, 344 Md. 548, 688 A.2d 436 (1997) ("Parents who sell or give an automobile to an adult child are not responsible for damages when they lack the power to control the child or the automobile").

5. Dram Shop

Maryland does not recognize a cause of action against a licensed vendor for furnishing alcoholic beverages to one who thereafter negligently injures a third party. See *Felder v. Butler*, 292 Md. 174, 438 A.2d 494

(1981). A tavern owner is not liable for injuries to patrons when the owner serves an obviously intoxicated patron alcoholic beverages. See *Warr v. JMGM Group, LLC*, 433 Md. 170, 70 A.3d 347 (2013).

C. Infliction of Emotional Distress Claims

1. Negligent Infliction of Emotional Distress

Generally, Maryland does not recognize negligent infliction of emotional distress as an independent tort. *Bagwell v. Peninsula*, 106 Md. App. 470, 665 A.2d 297 (1995); *Chew v. Meyer, 72 Md. App.* 132, 527 A.2d 828, cert. denied, 311 Md. 286, 533 A.2d 1308 (1987). But see, *Faya v. Almarez*, 329 Md. 435, 620 A.2d 327 (1993) (Maryland does recognize emotional distress as an element of damages to the extent proven in a negligence action). No state law cases have addressed the zone of danger, but the U.S. District Court for the District of Maryland found that there can be no recovery for negligent infliction of emotional distress upon a bystander who is in a place of safety

even under the most compelling set of facts. See *White v. Diamond,* 390 F. Supp. 867 (D. Md. 1974).

2. Intentional Infliction of Emotional Distress

Intentional infliction of emotional distress applies under only the most compelling circumstances, requiring intentional or reckless conduct, extreme and outrageous conduct, and a proximate causal connection between the conduct and the severe distress. See *Harris v. Jones*, 281 Md. 560, 380 A.2d. 611 (1977).

D. Wrongful Death

A wrongful death action is brought by certain relatives of a decedent and seeks recovery for their loss as a result of the death of the decedent. The focus on this type of action is not on the damages incurred by the decedent, but on the loss incurred by the plaintiff or plaintiffs. Maryland's Wrongful Death Act is codified in Sections 3-901 through 3-904 of the Courts & Judicial Proceedings Article of the Annotated Code of Maryland.

1. Plaintiffs

Maryland's Wrongful Death Act provides for two distinct classes of plaintiffs, referred to as primary beneficiaries and secondary beneficiaries. The primary beneficiaries for a wrongful death action are the spouse, parent, or child of a deceased person. See Md. Code Ann., Cts. & Jud. Proc., § 3-904(a). Secondary beneficiaries are defined as "any person related to the deceased person by blood or marriage who was wholly dependent upon the deceased" and "substantially dependent" upon the deceased and are included in the secondary class of beneficiaries under the statute. See Md. Code Ann., Cts. & Jud. Proc., § 3-904(b). Secondary beneficiaries may only recover if there are no qualified primary beneficiaries. "Child" is defined under Md. Code Ann., Cts. & Jud. Proc., § 3-901(b) as "a legitimate or an illegitimate child." The age of the individual child is of no consequence to the classification of primary or secondary beneficiary.

A parent may not be a beneficiary in a wrongful death action for the death of a child of the parent if the parent is convicted of, or has committed, child abuse, incest, rape, or any other sexual offense, and the other parent of the child is the victim of the crime or act and the other parent of the child is a child of the parent. Cts. & Jud. Proc., § 3-904(a)(2).

2. Defenses

Any defense which would have barred suit or recovery by the deceased also bars recovery by a wrongful death plaintiff, e.g., assumption of the risk or contributory negligence by the decedent. See Section 4. of this profile, Defenses to Claims.

3. Statute of Limitations

A wrongful death action must be filed within three years from the date of

death.

4. Damages

Pecuniary damages are designed to compensate for the loss of economic benefit which the plaintiff might reasonably have expected to receive from the decedent in the form of support, services or contributions during the remainder of the decedent's lifetime if he/she had not died.

Non-economic (solatium damages) are recoverable by the spouse, minor child or parent, of a minor child. Damages may include compensation for mental anguish, emotional pain and suffering, loss of society, companionship, comfort, protection, marital care, parental care, filial care, attention, advice, counsel, training, guidance or education where applicable. See Md. Code Ann., Cts. & Jud. Proc., § 3-904(d).

Solatium damages for the death of a minor child are not limited to the period of time when the child would have reached maturity. See *Barrett v. Charlson* 18 Md. App. 80, 305 A.2d 166 (1973).

The Maryland cap on non-economic damages applies to causes of action for wrongful death arising after October 1, 1994. In a wrongful death action in which there are two or more claimants or beneficiaries, an award of non-economic damages may not exceed 150% of the applicable limitation regardless of the number of beneficiaries who share in the award. See Md. Code Ann., Cts. & Jud. Proc., § 11-108(b)(3)(ii).

Maryland does not recognize the loss of a substantial chance of survival as a measure of damages or as a separate tort. See *Weimer v. Hetrick*, 309 Md. 536, 525 A.2d 643 (1987).

E. Survival Actions

In a survival action, damages are measured in terms of the harm to the victim whereas in a wrongful death action, damages are measured in terms of the harm to others from the loss of the victim. A survival action is, therefore, brought on behalf of the decedent by the personal representative of the estate of the decedent. In this action, the personal representative seeks recovery for the injuries suffered by the decedent. Economic damages which are recoverable include the decedent's lost wages and medical expenses incurred between the time of injury and death, in addition to funeral expenses of up to $15,000. See Md. Code Ann., Estates & Trusts, §8-106(c)(2). Non-economic damages recoverable include compensation for the pain and suffering endured by the decedent after the injury and before his/her death including compensation for such emotional distress and mental anguish as are capable of objective determination for pre-impact fright.

Damages recovered become assets of the estate. Any defense which would have barred suit or recovery by the deceased also bars recovery by survival action. The

Maryland cap on non-economic damages applies to survival actions. *Benyon v. Montgomery Cablevision Limited Partnership,* 351 Md. 460, 718 A.2d 1161 (1998).

F. Loss of Consortium

Loss of consortium can only be claimed in a joint action for injuries to the marital relationship. See *Deems v. Western M.R. Co.*, 247 Md. 95, 231 A.2d 514 (1967). Loss of consortium means loss of society, affection, assistance, companionship, conjugal fellowship and loss, or impairment of, sexual relations. There is a single cap on non-economic damages which applies to both the individual claim of an injured person and a loss of consortium claim by the marital unit, which is derivative therefrom; there is no separate cap for a consortium claim. See *Oaks v. Connors,* 339 Md. 24, 660 A.2d 423 (1995).

G. Premises Liability

In causes of action for injuries arising out of the use of real property, there are four (4) different categories that can be applied to an individual entering upon another's premises. The duty owed to such individuals, by the owner/occupier of the premises, differs depending on which of the following four (4) categories is applicable.

1. Business Invitee

An invitee is a person who is invited or permitted to be on another's property for purposes related to the owner's or occupant's business. The duty owed to an invitee is to use reasonable care to see that those portions of the property which the invitee may be expected to use are safe, which includes a duty to warn of known or should be known dangers. However, the only duty owed to an invitee who uses the property in a manner exceeding the invitation is to refrain from willfully or wantonly injuring or entrapping. See *Kirby v. Hylton,* 51 Md. App. 365, 433 A.2d 640 (1982). Moreover, there is ordinarily no duty to warn of obvious or known defects. *Maryland State Fair & Agricultural Soc'y v. Lee,* 29 Md. App. 374 (1975).

2. Social Guest or Licensee by Invitation

A social guest or licensee by invitation is a person who is permitted on the property of another for no business purpose of the owner or invitee but as the express or implied guest of the owner or occupier of the property. The duty owed to a social guest or licensee by invitation is to exercise reasonable care to make the premises safe or to warn the guest of known dangerous conditions that cannot reasonably be discovered by the guest.

3. Bare Licensee

A bare licensee is a person who is on the property with the consent but not at the invitation of the owner or occupier, and who is there to serve his or her own interests but not to serve any interest of the owner or occupier. There is no duty owed to a bare licensee except to refrain from willful injury or entrapment. A bare licensee takes the property as it exists.

4. Trespasser

A trespasser is a person who is on the property of another without the consent of the owner or occupier of the property. Similar to a bare license, there is no duty owed to a bare licensee except to refrain from willful injury or entrapment and a trespasser takes the property as it exists.

H. Products Liability

1. Strict Liability (Products)

Maryland has adopted the strict liability theory in Sec. 402A of Restatement (Second) of Torts. See *Phipps v. General Motors Corp.*, 278 Md. 337, 363 A.2d 955 (1976). This means that the manufacturer or seller who markets a defective and unreasonably dangerous product because of its design, or a defect in manufacture, is responsible for injuries to users or others resulting from the unreasonably dangerous defect. In order to succeed, the plaintiff must prove that the product was both in a "defective condition" and "unreasonably dangerous" when it was placed on the market. Id. at 344, 363 A.2d at 958. A product with a defective condition is unreasonably dangerous if the product with its defective condition is so dangerous that a reasonable person, knowing the risks involved, would not sell the product.

a. Contributory Negligence

Contributory negligence by the consumer is not a defense to strict liability. See *Sheehan v. Anthony Pools, A Div. of Anthony Indus., Inc.*, 50 Md. App. 614, 623, 440 A.2d 1085 (1982).

b. Assumption of the Risk

Assumption of the Risk will defeat a claim if plaintiff voluntarily and unreasonably proceeds with a known danger. See *Montgomery Cty. v. Valk Mfg. Co.*, 317 Md. 185, 562 A.2d 246 (1989).

c. Sealed Container Defense

Maryland law protects sellers, unless the manufacturer cannot be held accountable. See Md. Code Ann., Cts. & Jud. Proc. § 5-405. A seller of a product can use the sealed container defense in an action against them for property damage or personal injury allegedly caused by the defective design or manufacture of a product. They must establish that: (1) The product was acquired and then sold or leased in a sealed container or in an unaltered form; (2) They had no knowledge of the defect; (3) In the performance of the duties they performed, or while the product was in their possession, they could not have discovered the defect while exercising reasonable care; (4) They did not manufacture, produce, design, or designate the specifications for the product which conduct was the proximate and substantial cause of the claimant's injury; and (5) They did not alter, modify, assemble, or mishandle the product while in the seller's possession, in manner was that the proximate and substantial cause of the claimant's injury. See Md. Code Ann., Cts. & Jud. Proc. § 5-405.

d. Unavoidably Unsafe Products

There are certain beneficial products which, because of their nature, ingredients or characteristics, cannot be made totally safe for their intended or ordinary use. These products are called Unavoidably Unsafe Products and the maker or seller is not liable for injuries resulting from their use if the benefits from their use outweigh the risk of injury; there are no alternative products that are both safe and will serve the same purposes and achieve the same result; and the products are properly prepared and contain adequate warnings of the risks involved.

2. Liability for Breach of Warranty (Products)

An **express warranty** is a representation about a product made by the seller to a buyer who relies upon the representation in purchasing the product. Any statement of fact made by the seller to the buyer about the goods is an express warranty that the product conforms to the statement or promise made. Such statement or promise may be oral or in writing. No particular words are necessary to create an express warranty, nor is it necessary that the seller use formal words such as warrant or guarantee or that the seller have a specific intention to make a warranty, but an affirmation merely of the value of the product or a statement purporting to be merely the seller's opinion or commendations of the product does not create a warranty.

When products are sold, there is an **implied warranty**, or a promise that the products are fit for the ordinary purposes for which such products are used. Alternatively, when the seller at the time of contracting has reason to know any particular purpose for which the products are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable products, there is an implied warranty of fitness for that particular purpose. A seller who breaks these warranties or promises is responsible to a person who sustains injury as a result.

a. Notice of Breach of Warranty

A seller or manufacturer is not responsible for a breach of warranty unless the buyer gave to the seller or manufacturer notice of such breach within a reasonable time after the buyer knew or should have known of the alleged defect. What amounts to a reasonable time depends on the circumstances and the kind of product involved. Notice may be oral or in writing. No particular form of notice is required. The seller must merely be informed of the alleged breach of warranty or defect in the goods.

b Effect of User's Allergy

Any warranty that the goods involved in this case possessed certain characteristics or were suitable for a certain purpose was based on the assumption that the goods would be used by a normal person. There is no breach of warranty when a product is harmless to a normal person. A person cannot recover damages for breach of

warranty if the injury or damage resulted solely from an allergy or physical sensitivity to which normal persons are not subject.

c. Effect of Improper Use

Any warranty of the goods is based on the assumption that they would be used in a reasonable manner appropriate to the purpose for which they were intended. A person cannot recover damages for breach of warranty if the injury or damage the person suffered resulted solely from the person's improper use of the goods.

d. Effect of Use After Defect Is or Should Be Known

A person, using a product after the person knew or should have known of the defect or condition which the person claims was a breach of warranty, may not recover unless a reasonable person would use the product in spite of that knowledge.

e. Substantial Change Creating Danger - Manufacturer

The manufacturer is not responsible if the unreasonably dangerous defect was created as a result of a substantial change made by another to the product after it was manufactured.

f. Substantial Change Creating Danger – Seller

The seller is not responsible if the unreasonably dangerous defect was created as a result of a substantial change made by another to the product after it was sold.

3. Liability for Negligence (Products)

a. Design, Manufacturing, Testing and Inspection

The manufacturer of a product has a duty to use reasonable care in the design, manufacturing, testing and inspection of the product to see that the product is safe for any reasonably foreseeable use. A failure to fulfill that duty is negligence.

b. Duty of Manufacturer to Warn

If despite exercising reasonable care in the design, manufacturing, testing and inspection of the product, the product still cannot be made safe for its reasonably foreseeable use, and the manufacturer knows or through the use of reasonable care should know that the dangerous condition is not obvious to the user of the product, the manufacturer has a duty to give an adequate warning of the danger. A failure to fulfill that duty is negligence.

c. Duty of Manufacturer for Material or Part Supplied by Another

A manufacturer who uses in a product any material or part manufactured by another has a duty to make reasonable inspections

and tests of the material or part necessary to manufacture a finished product reasonably safe for its reasonably foreseeable use. A failure to fulfill that duty is negligence.

d. Duty of Component Maker or Material Processor
The maker of a component part or processor of materials used in a product finished or assembled by another has the same duty of care with regard to component parts or materials as the manufacturer of the finished product.

e. Duty of Seller Assuming Role of Manufacturer
Persons who sell products manufactured by others as their own products have the same duty of care as the manufacturer.

f. Duty of Lessor of a Product
A lessor of a product must use reasonable care to make it safe for its reasonably foreseeable usage, and this duty includes the giving of adequate warning of dangers which are not obvious to the user but are known, or through reasonable care should be known to the lessor. A failure to fulfill that duty constitutes negligence.

g. Contributory Negligence
When a claim of liability is based on negligence, users of a product must use reasonable care for their own safety. This general obligation applies to all usage of the product including reasonable adherence to warnings and instructions; and reasonable care respecting any defect or dangerous condition which should be known to the user. The failure to exercise such care may be contributory negligence.

I. Bailment

In Maryland, by definition, a bailment is the delivery and acceptance, or obtaining of, possession of property for a particular purpose without transfer of ownership. The bailor is the party who delivers the property and the bailee is the party who receives or has possession of the property and is required to return the property when the purpose for the delivery or obtaining possession is accomplished. Further, the bailee cannot dispute the bailor's title.

1. Bailment for Hire

A bailment for hire situation is where both the bailor and bailee benefit. In order to recover damages, the bailor must prove that a bailment for hire existed and that the bailee did not return the property in the condition it was received, other than ordinary wear and tear. If the loss occurred as a result of an accident beyond the control of the bailee, the bailor may still recover if it is shown that the accident could have been avoided by the bailee's use of reasonable care. The burden is on the bailor to show that the loss could have been avoided had the bailee exercised reasonable care over the property.

2. Gratuitous Bailment

For a gratuitous bailment to exist, delivery of property is for the sole benefit of the owner, and totally without the benefit to the person who receives the property. The bailee, the one who receives the property, must use only such care with respect to the property as persons normally use with respect to their own property. Therefore, the bailee is liable only for wrongful conduct which the bailor has the burden of proving. See *Mickey v. Sears, Roebuck & Co.*, 196 Md. 326 (1950).

3. Unlawful Conversion

Lastly, an unlawful conversion by the bailee is when a wrongful taking or wrongful use of the property occurs. This happens when the bailee (1) uses the bailed property for a purpose or in a manner which is not consistent with the terms of the bailment; or (2) claims rights to the bailed property which are not consistent with the bailor's rights in the property; or, (3) acts with respect to the bailed property in a manner which is not consistent with the bailor's ownership of the property.

IV. DEFENSES TO CLAIMS

A. Limitations

1. Generally

Maryland requires that a civil action commence within three (3) years of the date that the cause of action arose, unless another provision in the code provides a different time period. See Md. Code Ann., Cts. & Jud. Proc., §5-101. Maryland law requires that the statute of limitations defense be specifically pled or it is deemed waived. Once pled, however, it is strictly enforced by the courts.

2. Tort Actions

A plaintiff must file a tort claim within three (3) years of when the plaintiff knew or should have known that he or she had a cause of action. See Md. Code Ann., Cts. & Jud. Proc. § 5-101; see also *Doe v. Archdiocese of Wash.*, 114 Md. App. 169, 689 A.2d 634 (1997); *Poffenberger v. Risser*, 290 Md. 631, 431 A.2d 677 (1981).

3. Assault, Libel, and Slander

An action for assault, libel or slander must be filed within one (1) year of the accrual of the cause of action. See Md. Code Ann., Cts. & Jud. Proc. §5-105; see also *Bagwell v. Peninsula Regional Medical Ctr.*, 106 Md. App. 470, 665 A.2d 297 (1995), cert. denied, 341 Md. 172, 669 A.2d 1360 (1996).

4. Medical Malpractice

An action for damages for injury arising out of the rendering or failure to render professional services by a health care provider, must be filed within the earlier of (a) five (5) years of the time the injury was committed; or (b) three (3) years of the date the injury was discovered. See Md. Code Ann., Cts & Jud. Proc. § 5-109. An injury occurs when legally compensable tort damages first occur, regardless of whether those damages are discoverable or undiscoverable. See *Edmonds v. Cytology Servs. of Md., Inc.*, 111 Md. App. 233, 681 A.2d 546 (1996).

5. Occupational Diseases

An action for damages arising out of an occupational disease must be filed within three (3) years of the discovery of facts from which it is known, or reasonably should have been known, that an occupational disease was the proximate cause of death, but in any event not later than ten (10) years from the date of death. See Md. Code Ann., Cts. & Jud. Proc. § 5-113.

6. Persons Under a Disability

When a cause of action accrues in favor of a minor or mental incompetent, that person must file an action within the lesser of three (3) years or the applicable period of limitations after the date the disability is removed. This provision does not apply if the statute of limitations has more than three (3) years to run when the disability is removed. Imprisonment, absence from the State or marriage are not considered to be disabilities which extend the statute of limitations. See Md. Code Ann., Cts. & Jud. Proc. § 5-201. This section is not applicable to workers' compensation claims.

7. Miscellaneous Provisions

Contractual clauses shortening the limitations period are valid provided (1) there is no controlling statute to the contrary; (2) it is reasonable; and (3) it is not subject to other defenses such as fraud, duress, or misrepresentation See *College of Notre Dame of Maryland, Inc. V. Morabito Consultants, Inc.*, 132 Md.App. 158, 174 (2000).

Limitations against insurer for bad faith claims do not begin to run until insurer denies the claim. See *Lane v. Nationwide*, 321 Md. 165, 582 A.2d 501
(1990).

The statute of limitations does not run against the United States, the State of Maryland, or the political subdivisions of the State including municipalities when performing governmental functions. See *United States v. Fidelity-Baltimore Nat'l Bank & Trust Co.*, 173 F. Supp. 565 (D. Md. 1959); *Foos v. Steinberg*, 247 Md. 35, 230 A.2d 79 (1967); *Anne Arundel County v. McCormack*, 323 Md. 688, 594 A.2d 1138 (1991); *Goldberg v. Howard County Welfare Board*, 260 Md. 351, 272 A.2d 397

(1971).

Special provisions apply to asbestos cases. See Md. Code Ann., Cts. & Jud. Proc. § 5-108.

B. Contributory Negligence

Maryland is a contributory negligence state. Therefore, a lack of reasonable care on the part of the plaintiff, however slight, is a *complete bar* to recovery if such negligence contributes to the plaintiff's injury. See *Baltimore County v. Keenan*, 232 Md. 350, 193 A.2d 30 (1963). The burden is on the defendant to prove the plaintiff's contributory negligence by a preponderance of the evidence. See

Atlantic Nut v. Kenney, 323 Md. 116, 591 A.2d 507 (1991). A child is held to the same degree of care as an adult, with the possible exception of children of young and tender age who are held to the standard of conduct of a reasonable child of the same age, experience, and intelligence as the plaintiff child. See *Taylor v. Armiger*, 277 Md. 638, 358 A.2d 883 (1976).

C. Last Clear Chance

While technically not considered a defense to a claim, last clear chance is a defense to contributory negligence. When a plaintiff is contributorily negligent, that plaintiff may claim that the defendant committed a fresh act of negligence at a time when the defendant could have avoided the accident and the plaintiff could not have. See *Myers v. Alessi*, 80 Md. App. 124, 560 A.2d 59, cert. denied, 317 Md. 640, 556 A.2d 101 (1989); *Ritter v. Portera*, 59 Md. App. 65, 474 A.2d 556 (1984).

D. Assumption of the Risk

A plaintiff is *completely barred* from recovery if he or she assumes the risk of injury when, with full knowledge and understanding of an obvious danger, he or she voluntarily exposes himself or herself to that risk of injury. See *Schroyer v. McNeal*, 323 Md. 275, 592 A.2d 1119 (Md. 1991).

In determining whether a plaintiff had knowledge and appreciation of the risk, an objective standard must be applied. A plaintiff will not be heard to say that he did not comprehend a risk which must have been obvious to him. The issue is normally one for the jury, unless it is clear that a person of normal intelligence in the position of the plaintiff must have understood the danger, in which case the issue is for the Court to decide. There are certain risks which anyone of adult age must be able to appreciate, including the danger of slipping on ice, falling through unguarded openings, and lifting heavy objects. See *Martin v. ADM Partnership*, 106 Md. App. 652, 666 A.2d 659 (1995), reversed, *ADM Partnership v. Keen Tykenko Martin*, 348 Md. 84, 702 A.2d 730 (1997).

The difference between assumption of the risk and contributory negligence is slight. Assumption of the risk implies an intentional exposure to a known danger, something that may or may not be true of contributory negligence. Either way, the elements of negligence are not an issue in assumption of risk and need not be proved. See

Schroyer v. McNeal, 323 Md. 275, 592 A.2d 1119 (Md. 1991).

E. Immunity

1. Interspousal

For events occurring after July 1, 1983, there is no interspousal immunity. See *Stover v. Stover*, 60 Md. App. 470, 483 A.2d 783 (1984).

2. Parent-Child Immunity

Maryland recognizes parental immunity for most torts but has limited immunity in cases involving the operation of a motor vehicle. The doctrine provides that recovery for negligence is generally not allowed. However, where the parental relationship is abandoned, as evidenced by cruel and inhumane treatment of the child or malicious and wanton wrongs against the child, recovery is allowed. See *Mahnke v. Moore*, 197 Md. 61, 77 A.2d 923 (1951) As such, parent-child immunity does not bar a wrongful death action filed on behalf of an unemancipated minor child against the child's parent when the action is based on the murder or voluntary manslaughter by that parent of the child's other parent. See *Eagan v. Calhoun*, 347 Md. 72, 698 A.2d 1097 (1997).

The barrier against parents does not extend to an adult child who has the right to sue his/her parent for injuries inflicted on the child because of the parent's negligence. See *Waltzinger v. Birsner*, 212 Md. 107, 128 A.2d 17 (1957). It is only the unemancipated child who has been stripped of his/her right of recovery. The parent-child immunity does not extend to step-parents. See *Warren v. Warren*, 336 Md. 618, 650 A.2d 252 (1994).

The parent-child immunity is limited in actions arising out of the operation of a motor vehicle. The immunity does not apply up to the point of the limits of motor vehicle liability coverage or uninsured motor vehicle coverage. However, the parent-child immunity does apply above the limits of the applicable policy of insurance. Cts. and Jud. Proceedings 5-806; Allstate v. Kim, 376 Md. 276 (2003).

3. Sovereign Immunity

The doctrine of sovereign immunity prevents the State or its municipalities from being held liable in damages for an unconstitutional act absent a legislative waiver. See *Ritchie v. Donnelly*, 324 Md. 344, 597 A.2d 432 (1991). The Maryland Tort Claims Act waives the State's sovereign immunity in negligence cases if its notice requirements are met. A written claim must be sent to the Treasurer or the designee of the Treasurer, within one (1) year after the injury. Md. Code Ann., State Government §12-101 *et seq*. Liability of the State and its units is also limited that it may not exceed $400,000 to a single claimant for injuries arising from a single incident or occurrence.

The Local Government Tort Claims Act contains no specific waiver of

governmental immunity when a governmental entity is sued in its own capacity. It waives only those immunities the government could have in an action raised against its employee. One Year Notice period from the injury to invoke the waiver. Md. Code Ann., Cts. & Jud. Proc. §5-301 *et seq*. The Notice must be by certified mail, return receipt requested and to specified person(s), which depends on which local government entity is the proposed defendant. The Act requires the local government to assume financial responsibility for a judgment against its employee by abolishing that immunity the government may have had against responsibility for the acts of its employees, but does not create liability on the part of the local government as a party to the suit. *Khawaja v. Mayor of Rockville*, 89 Md. App. 314, 598 A.2d 489 (1991).

F. Misuse of Product

Maryland has adopted Section 402(a) of the Restatement of Torts. Proof that a person knows of the defect yet continues to voluntarily use the product is a defense to a strict liability claim; however, mere inattentiveness or contributory negligence of the plaintiff does not constitute a defense.

G. Sophisticated User Defense

A seller has no duty to warn all potential users of a product if it is reasonable for the seller to rely on the purchaser or the employer to transmit the warnings to its employees. See *Kennedy v. Mobay Corp.*, 84 Md. App. 397, 579 A.2d 1191 (1990), aff'd, 325 Md. 385, 601 A.2d 123 (1992).

H. Exclusivity of Workers' Compensation Claim

Workers' compensation is the sole remedy for an injured worker as against his or her employer, unless the employer fails to secure compensation for the injured worker, the employer intentionally tries to injure or kill the employee, or by contract waives immunity, i.e., a hold harmless agreement. See Md. Code Ann., Lab. & Empl. § 9-509. The exclusivity also applies to supervisory employees acting in the course of their supervisory duties: "Absent express authorization by the employer, the [employer's] agent [committing the intentional tort] must be the 'alter ego' of the employer in order for his intentional misconduct to be attributed to the employer." *Schatz v. York Steak House*, 51 Md. App. at 496-497, 444 A.2d at 1047.

V. DISCOVERY

A. Generally

A party may obtain discovery regarding any matter, not privileged, including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter, if the matter sought is relevant to the subject matter involved in the action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other

party. It is not grounds for objection that the information sought is already known to or otherwise obtainable by the party seeking discovery or that the information will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. A discovery request otherwise proper is not objectionable merely because the response involves an opinion or contention that relates to fact or the application of law to fact.

B. Interrogatories

1. Generally

Interrogatories are written questions formally propounded by any party to an action upon any other party to an action. The responding party must answer each interrogatory separately and fully in writing under oath, or shall state fully the grounds for refusal to answer any interrogatory. Interrogatories, however grouped, combined or arranged and even though subsidiary or incidental to or dependent upon other interrogatories, are counted separately. A party who has responded to interrogatories and who obtains further material information before trial shall supplement the response promptly.

2. District Court

Unless the court orders otherwise, a party may serve only one set of not more than fifteen (15) interrogatories to be answered by the same party. The plaintiff may serve interrogatories no later than ten (10) days after the date on which the clerk mails the defendant's Notice of Intention to Defend. The defendant may serve interrogatories no later than ten (10) days after the time for filing a notice of intention to defend. The party to whom the interrogatories are directed must serve a response within fifteen (15) days after service of the interrogatories or within five (5) days after the date on which that party's notice of intention to defend is required, whichever is later.

3. Circuit Court

Unless the court orders otherwise, a party may serve one or more sets having a cumulative total of not more than thirty (30) interrogatories to be answered by the same party. The party to whom the interrogatories are directed shall serve a response within thirty (30) days after service of the interrogatories or within fifteen (15) days after the date on which that party's initial pleading or motion is required, whichever is later.

C. Request for Production of Documents and Property

1. Generally

Any party may serve at any time one or more requests to any other party as to items that are in the possession, custody, or control of the party upon

whom the request is served, to produce and permit the party making the request, or someone acting on the party's behalf, to inspect and copy any designated documents (including writings, drawings, graphs, charts, photographs, recordings, and other data compilations from which information can be obtained, translated, if necessary, by the respondent

through detection devices into reasonably usable form) or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of discovery; or to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection, measuring, surveying, photographing, testing, or sampling the property or any designated object or operation on the property, within the scope of discovery.

2. District Court

Whereas there is no formal document or property request allowed in the District Court system, a party by interrogatory may request the party upon whom the interrogatory is served to attach to the response or submit for inspection the original or an exact copy of any written instrument upon which a claim or defense is founded; a statement concerning the action or its subject matter previously made by the party seeking discovery; and any written report, whether acquired or developed in anticipation of litigation or for trial, made by an expert whom the responding party expects to call as an expert witness at trial.

3. Circuit Court

A request shall set forth the items to be inspected, either by individual item or by category, and shall describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The party to whom a request is directed must serve a written response within thirty (30) days after service of the request or within fifteen (15) days after the date on which that party's initial pleading or motion is required, whichever is later. The response must state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is refused, in which event the reasons for refusal must be stated. If the refusal relates to part of an item or category, the part must be specified. A party who produces documents for inspection must produce them as they are kept in the usual course of business or must organize and label them to correspond with the categories in the request.

D. Request for Admission of Facts and Genuineness of Documents.

1. Generally

A party may serve at any time one or more written requests to any other party for the admission of the genuineness of any relevant documents

described in or exhibited with the request, or the truth of any relevant matters of fact set forth in the request. Copies of documents must be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Any matter admitted through this procedure is conclusively established unless the court on motion permits withdrawal or amendment. If a party fails to admit the genuineness of any document or the truth of any matter as requested under this Rule and if the party requesting the admissions later proves the genuineness of the document or the truth of the matter, the party may move for an order requiring the other party to pay the reasonable expenses incurred in making the proof, including reasonable attorney's fees.

2. District Court

A Request for Admission of Facts and Genuineness of Documents is not available in the District Court system.

3. Circuit Court

Each matter of which an admission is requested will be deemed admitted unless, within thirty (30) days after service of the request or within fifteen (15) days after the date on which that party's initial pleading or motion is required, whichever is later, the party to whom the request is directed serves a response signed by the party or the party's attorney. As to each matter of which an admission is requested, the response must specify an objection, or must admit or deny the matter, or must set forth in detail the reason why the respondent cannot truthfully admit or deny it. The reasons for any objection must also be stated.

E. Depositions

1. District Court

Depositions are extremely rare in the District Court system and are only taken by agreement and stipulation or upon court order following application by a party and on good cause being shown.

2. Circuit Court

Any party to an action may cause the testimony of a person, whether or not a party, to be taken by deposition for the purpose of discovery or for use as evidence in the action or for both purposes. Leave of court must be obtained to take a deposition (a) before the earliest day on which any defendant's initial pleading or motion is required; (b) that is longer than one seven-hour day (c) of an individual confined in prison or (d) of an individual who has previously been deposed in the same action unless further deposition is permitted because substantive changes have been

made to the deposition transcript. Leave of court may be granted on such terms as the court prescribes. A party desiring to take a deposition shall serve a notice of deposition upon oral examination at least ten (10) days before the date of the deposition, unless the deponent is also required to produce documents or other tangible items, in which case thirty (30) days notice is required. A resident of this State who is not a party may be required to attend a deposition in this State only in the county in which the person resides or is employed or engaged in business, or at any other convenient place fixed by order of court. A nonresident who is not a party may be required to attend a deposition in this State only in the county in which the nonresident is served with a subpoena or within forty (40) miles from the place of service, or at any other convenient place fixed by order of court.

F. Independent Mental or Physical Examinations (IME)

1. Generally -- Pre-Suit Examinations

When the mental or physical condition or characteristic of a party or of a person in the custody or under the legal control of a party is in controversy, the court may order the party to submit to a mental or physical examination by a suitably licensed or certified examiner or to produce for examination the person in the custody or under the legal control of the party. The order may be entered only on motion for good cause shown and upon notice to the person to be examined and to all parties. There is no provision under Maryland law for obtaining an IME prior to litigation, unless of course, the parties were to agree to such examination. In so doing, the claims adjuster should be wary of any attempt by the plaintiff to have such examination constitute an independent medical examination for the purposes of litigation.

2. District Court

There is no provision for obtaining an IME in District Court suits, however, there is nothing preventing a party from having an independent medical examination of records only, which can then be submitted under Courts and Judicial Proceedings Article, §10-104, which negates the requirement that the independent examiner appear at trial.

3. Circuit Court

In Circuit Court cases, the Court may order the party upon motion and good cause shown, to submit to a mental or physical examination when the mental or physical condition or characteristic of a party or of a person in the custody or under the legal control of a party is in controversy. See Maryland Rule 2-423. In practice, in personal injury cases, IME's are regularly conducted without the requirement of filing a motion to do so.

If an IME was performed prior to litigation, whether a subsequent IME will be permitted will be within the discretion of the Court. In most circumstances, the prudent course of conduct would be to get the plaintiff's attorney to agree in writing that the pre-suit IME will not prohibit any subsequent examinations which may be requested pursuant to Maryland Rule 2-423.

G. Discovery of Work Product

Discovery is generally constrained only by questions of relevance. However, some materials, such as confidential communication with counsel (subject to attorney-client privilege) and material prepared in anticipation of litigation (work product privilege), are protected from discovery.

For the work product privilege to apply, the materials sought to be discovered must have been prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative. A representative of the other party includes an attorney, consultant, surety, indemnitor, insurer, and agent. The Maryland Court of Appeals has held that discovery rules are to be liberally construed and that trial judges are vested with reasonable sound discretion in applying these rules. See *Baltimore Transit Co. v. Mezzanoti*, 227 Md. 8, 174 A.2d 768 (1961). Whether a document or other tangible thing was prepared in anticipation of litigation or for trial and, therefore, protected from discovery is a question of fact which, if in dispute, is to be determined by the trial judge following an evidentiary hearing. See *Kelch v. Mass Transit Admin.*, 287 Md. 223, 411 A.2d 449 (1980).

H. Discovery of Policy Limits

A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business might be liable to satisfy part or all of a judgment that might be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. See Maryland Rule 2-402. Information concerning the insurance agreement is not, by reason of disclosure, admissible as evidence at trial.

I. Collateral Source Rule

In a strict tort action, there is no set-off for monies obtained through collateral sources. The collateral source rule allows admission of collateral source payments only if there is a preliminary showing of malingering or exaggeration of injury. See *Swann v. Prudential Ins. Co.*, 95 Md. App. 365, 379, 620 A.2d 989 (1993), rev'd on other grounds, *Dover Elevator Co. v. Swann*, 334 Md. 231 (1994). Evidence as to collateral payments is inadmissible in the absence of evidence of malingering or exaggeration or where the real purpose of the evidence offered as to collateral sources is the mitigation of liability for damages of the defendant. See *Kelch v. Mass Transit Admin.*, 42 Md. App. 291, 296, 400 A.2d 440 (1980).

VI. MOTIONS PRACTICE

A. Generally

A written motion and a response to a motion must state with particularity the grounds and the authorities in support of each ground. A party must attach as an exhibit to a written motion or response any document that the party wishes the court to consider in ruling on the motion or response unless the document is adopted by reference. Except as otherwise provided in this section, a party against whom a motion is directed must file a response within fifteen (15) days after being served with the motion, or within the time allowed for a party's original pleading, whichever is later. A motion or a response to a motion that is based on facts not contained in the record or papers on file in the proceeding must be supported by affidavit and accompanied by any papers on which it is based. When a motion is filed, the court must determine in each case whether a hearing will be held, but it may not grant the motion without a hearing. A party desiring a hearing must make such a request in the Motion.

B. Motion for a More Definite Statement

If a pleading to which an answer is permitted is so vague or ambiguous that a party cannot reasonably frame an answer, the party may move for a more definite statement before answering. The motion points out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within fifteen (15) days after entry of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

C. Motion to Dismiss

A Motion to Dismiss may be filed with the court either before or after the Answer is filed, although the defenses of (1) lack of jurisdiction over the person, (2) improper venue, (3) insufficiency of process, and (4) insufficiency of service of process, must be made by Motion to Dismiss before the Answer is filed or they are deemed to be waived. The defenses of (1) lack of jurisdiction over the subject matter, (2) failure to state a claim upon which relief can be granted, (3) failure to join a party, may be made by Motion to Dismiss at any time.

D. Motion for Summary Judgment

Maryland Rule 2-501 provides for a Motion for Summary Judgment. This rule is substantially similar to its Federal counterpart, Federal Rule of Civil Procedure 56.

Summary Judgment may be granted when (1) the facts material to the judgment are not in dispute and (2) the moving party is entitled to judgment as a matter of law. See *Southland Corp. v. Griffith*, 332 Md. 704, 633 A.2d 84 (1993); *Sachs*

v. Regal Savings Bank, 119 Md. App. 276, 705 A.2d 1 (1998), aff'd, *Regal Savings Bank v. Sachs*, 352 Md. 356, 722 A.2d 377 (1999) (holding that in reviewing a disposition by motion for summary judgment, an appellate court resolves all inferences against the party making the motion).

To overcome its burden of proof, the moving party provides support for the motion via affidavit, documenting depositions, answers to interrogatories or request for admissions of fact that establish the foundation of the movant's claim.

VII. DAMAGES

A. Compensatory Damages

1. Generally

"Special damages" are all those injuries that flow as a natural consequence of the tortious act. Beyond the immediate damage to the body, however, is the possibility of manifold additional "out of pocket" expenses, also known as "special damages." These damages may include, but are not limited to, medical, dental, or psychiatric treatment bills, bills for physical or vocational therapy, lost earnings, loss of earnings capacity, medication, prosthetic devices, transportation expenses to and from health care providers, property damage or losses, mental anguish or emotional distress, future medical expenses, permanent physical impairment, disfigurement, future lost earnings based upon life expectancy, and other probable future consequences. All special compensatory damages must be proven to a reasonable certainty and may not be premised upon mere speculation or conjecture.

2. Bodily Injury

Economic damages are based upon the actual expense incurred or loss of value of those items or services. Non-economic damages, including pain and suffering, are subject only to the limitations set forth in Md. Code Ann., Cts. & Jud. Proc., § 11-108. All damages are determined by the trier of fact.

3. Property Damage

Actual market value is recoverable. See *Weishear v. Canestrale*, 241 Md. 676, 217 A.2d 525 (1966). *Bastian v. Laffin*, 54 Md. App. 703, 460 A.2d
623 (1983). If a plaintiff can prove that after repairs, the property has a diminished market value from being injured, then in addition to the cost of repairs, plaintiff can also recover post-repair diminution in value, provided the two together (cost of repair and diminution) do not exceed the pre- repair diminution in value of the property, measured as the difference in value immediately before and then after the injury. See *Fred Frederick Motors, Inc. v. Krause*, 12 Md. App. 62 (1971).

4. Total Loss of Motor Vehicle or Other Property

Actual market value at the time of the loss. See *Bailey v. Ford*, 151 Md. 664, 135 A 835 (1927).

5. Loss of Use or Rental Value of Motor Vehicle

Fair market value for the replacement of a similar vehicle, restricted to such reasonable period as the evidence shows plaintiff was actually deprived of the use of the vehicle as a result of the accident. See *Schweitzer v. Showell*, 19 Md. App. 537, 313 A.2d 97 (1974). Actual damages must be shown; i.e., the plaintiff must prove that he incurred a loss as a result of the deprivation of use.

6. Pre-Judgment Interest

Generally, pre-judgment interest is not recoverable absent agreement (i.e. provided in a contract) or if the sum sued for is a liquid (i.e. determinable) amount. However, interest on automobile liability claims (at the rate of not more than 10% per annum may be awarded from a time not earlier than the time the action was filed) can be awarded if the court finds that the defendant caused unnecessary delay in having the action ready or set for trial. A delay caused by the defendant's insurer or counsel is deemed an unnecessary delay caused by the defendant. See Md. Code Ann., Courts & Jud. Proc. § 11-301.

7. Post-Judgment Interest

Post-judgment interest is collectible at the legal rate of 10% per annum on the amount of the judgment. See Md. Code Ann., Cts. & Jud. Proc. § 11-107.

8. Limitations on Damages

There is no cap on economic damages (medical bills, lost wages, property damages) or punitive damages.

Non-economic damages (pain and suffering) are capped at $350,000 for bodily injuries sustained in causes of action accruing between July 1, 1986 and September 30, 1994. The cap increased to $500,000 for actions arising on or after October 1, 1994. See Md. Code Ann., Cts. & Jud. Proc., § 11-108. The cap is automatically increased annually by $15,000 on October 1 of each year. The increased cap applies to causes of action accruing between October 1 of that year and September 30 of the following year inclusive. See Md. Code Ann., Cts. & Jud. Proc., § 11-108 (b)(2)(ii). The cap increased to $770,000 on October 1, 2012.

A single cap applies to both the individual personal injury claim and the loss of consortium claim, and is not aggregated. See *Oaks v. Connors*, 339 Md. 24, 660 A.2d 423 (1995). In wrongful death cases, the total maximum award of non-economic damages for two or more eligible claimants arising out of one death is 150% of the cap regardless of the number of claimants or beneficiaries. See Md. Code Ann., Cts. & Jud. Proc., § 11-108(b)(3)(ii).

9. Emotional Distress

Emotional distress may be proven as an element of damages in a negligence action.

10. Impairment of Future Wage Earning Capacity

In personal injury cases, Maryland courts consider lost wages and earnings suffered by the injured person not only from the time of injury to the trial, but those reasonably certain to occur in the future. See *Brooks v. Fairman*, 253 Md. 471, 252 A.2d 865 (1968). For purposes of judicial simplicity, these awards are generally computed to a bottom line lump sum award. See *Scott v. James Gibbons Co.*, 192 Md. 319, 64 A.2d 117 (1949).

Verdicts for damages for personal injury in which the cause of action arises after July 1, 1989 or, for wrongful death in which the cause of action arises on or after October 1, 1994, must be itemized to reflect the intended amount for: (1) past medical expenses; (2) future medical expenses; (3) past loss of earnings; (4) future loss of earnings; (5) non- economic damages; and (6) other damages. See Md. Code Ann., Cts. & Jud. Proc., § 11-109(b); *Wyatt v. Johnson*, 103 Md. App. 250, 653 A.2d 496 (1995).

Maryland permits economists to render an opinion on the value of loss of services, including wage-earning capacity. See *Valk Manufacturing v. Rangaswamy*, 74 Md. App. 304, 537 A.2d 622, (1988), rev'd on other grounds, *Montgomery Co. v. Valk Manufacturing*, 317 Md. 185, 562 A.2d 1246 (1989).

B. Attorney's Fees

1. Generally

Generally, attorney's fees are not recoverable against another party unless they are permitted by contract or statute. In tort litigation, each party is required to pay their own attorney's fees regardless of the result of the litigation. Caution should be taken however with certain actions maintained under federal and state laws pertaining to discrimination as those particular statutes may have provisions which permit plaintiffs to seek attorney's fees.

2. Actions Against Insurers

When the insured must resort to litigation to enforce a liability carrier's contractual duty to provide coverage for his/her potential liability to third persons, the insured is entitled to recovery of attorney's fees and expenses incurred in that litigation. See *Nolt v. U.S. Fidelity and Guaranty Co.*, 329 Md. 52, 617 A.2d 578 (1993); *Brohawn v. Transamerica Ins. Co.*, 276 Md. 396, 347 A.2d 842 (1975); *Cohen v. American Home Assur. Co.*, 255 Md. 334, 258 A.2d 225 (1969). However, the court has also held, in the

context of a director's and officer's policy, that there is no recovery of attorney's fees where the insurer denied coverage in good faith. See *Collier v. MD-Individual Practice Ass'n, Inc.*, 327 Md. 1, 607 A.2d 537 (1992).

3. Frivolous Actions or Pleadings

Maryland Rule 1-341 provides that costs and attorney's fees are recoverable against the party and/or his attorneys if the court finds that the conduct of the party in maintaining or defending any proceeding was in bad faith or without substantial justification.

C. Punitive Damages

1. Generally

To support an award of punitive damages, there must be at least a nominal award of compensatory damages. See *Montgomery Ward Stores v. Wilson*, 339 Md. 701, 664 A.2d 916 (1995); *Montgomery Ward & Co. v. Keulemans*, 275 Md. 441, 446, 340 A.2d 705, 708 (1975).

2. Standard of Proof - Actual Malice

To uphold an award of punitive damages, plaintiff must show, by clear and convincing evidence, actual malice on the part of the defendant. See *Ellerin v. Fairfax Savings F.S.B.*, 337 Md. 216, 652 A.2d 1118 (1995); *Owens-Illinois v. Zenobia*, 325 Md. 420, 601 A.2d 633 (1992). Actual malice is defined as evil motive, intent to injure, ill will, or fraud.

3. Insurability of Punitive Damages

Public policy does not preclude insurance coverage for punitive damages, and it is not against public policy for the insurer to pay the punitive damages award assessed against an insured. See *First Nat'l Bank of St. Mary's v. Fidelity and Deposit Co.*, 283 Md. 228, 389 A.2d 359 (1978).

VIII. INSURANCE COVERAGE IN MARYLAND

A. Mandatory Liability Coverage

Every policy of motor vehicle liability insurance must contain coverage for the payment of claims for bodily injury or death arising from an accident of up to $30,000 for any one person and up to $60,000 for any two or more persons. Additionally, to cover the payment of claims for property of others damaged or destroyed in an accident, including interests and costs, minimum coverage in the amount of $15,000 must be maintained. See Md. Code Ann., Transp. §17-103(b).

B. Uninsured Motorist Coverage

1. Generally

Uninsured motor vehicle is defined to include a vehicle with less

insurance than the injured person's uninsured motorist coverage. Every policy of motor vehicle liability insurance issued, sold, or delivered in Maryland after January 1, 2011, shall contain coverage of at least $30,000 for any one person and up to $60,000 for any two or more persons in addition to interest and costs, which the insured is entitled to recover from the owner or operator of any uninsured motor vehicle because of bodily injuries sustained in an accident arising out of the ownership, maintenance or use of such uninsured motor vehicle. See Md. Code Ann., Ins., §19-509 (increased from $20,000.00 per person/$40,000.00 per person that had been unchanged as the law since 1975).Policies are also required to contain coverage for the payment of claims for property of others damaged or destroyed in an accident of up to $15,000. See Md. Code Ann., Transp., § 17-103.

Unless waived by the first named insured, the amount of uninsured motorist coverage under a policy of private passenger motor vehicle insurance must be equal to the amount of liability coverage provided under the policy. See Md. Code Ann., Ins., § 19-509(e). Any waiver must be in writing and cannot be a complete waiver, but at most can waive uninsured limits to the applicable minimum limits.

2. Exemptions from Uninsured Motorist Coverage

The state does not have to provide uninsured motorist coverage for vehicles it owns. See *Nationwide Mut. Ins. Co. v. United States Fid. & Guar. Co.*, 314 Md. 131, 550 A.2d 69 (1988). Buses, taxicabs, and off-road vehicles are exempted from the mandatory uninsured motorist coverage requirements. See *Pope v. Sun Cab Co.*, 62 Md. App. 218, 488 A.2d 1009 (1985); see also Md. Code Ann., Ins., § 19-509(b).

3. Fellow Employee Exclusion

Auto policy provisions completely excluding coverage for bodily injury to any fellow employee of the insured arising out of and in the course of his or her employment are invalid in Maryland. See *Larimore v. American Ins. Co.*, 314 Md. 617, 552 A.2d 889 (1989). The Court stated in *Larimore*: "Maryland workers' compensation law permits a worker, injured in the course of employment, to maintain a tort action against a fellow employee whose negligence caused the injury, even though the injured worker may be entitled to or has collected workers' compensation benefits. Many injuries in this category result from motor vehicle accidents. To uphold the fellow employee exclusion in motor vehicle insurance policies could result in a large class of claimants being without liability insurance coverage and in a large class of uninsured motorists."

However, auto policy provisions reducing the amount of coverage to Maryland's mandatory minimum limits (see VIII. A. above) for a fellow employee are valid and enforceable. See *Wilson v. Nationwide Ins. Co.*, 395 Md. 524 (2006)

C. Personal Injury Protection Coverage ("PIP")

1. Generally

Unless waived, every insurance policy issued in Maryland must provide for at least $2,500 in personal injury protection benefits to any covered person who is injured in a motor vehicle accident. See Md. Code Ann., Ins. § 19-505, *et seq.* PIP benefits are defined as the reasonable and necessary expenses arising from the accident for necessary medical, surgical, x-ray, and dental services, necessary ambulance, hospital, professional nursing and funeral services, and in the case of an income producer, payment of benefits for 85% of income lost as a result of the accident. See Md. Code Ann., Ins. § 19-505(b)(2).

2. Notification of Availability of Benefits

When an insurer providing PIP benefits receives written notice from an insured of a motor vehicle accident for which PIP benefits may be available, the insurer must notify the insured by mail of the latest date on which a claim may be filed for such benefits.

3. Time for Filing and Payment of Claims

An insurer providing PIP coverage for which an insured has filed must pay PIP benefits within thirty (30) days after receiving satisfactory proof of the claim. The policy may limit the time for the filing of claims with the insurer to a period of time not less than twelve (12) months after the date of the accident. See Md. Code Ann., Ins. § 19-508(a).

4. Exclusions and Exemptions, Md. Code Ann., Ins. §19-505(c)

a. Person who intentionally causes accident;
b. Person who is injured while operating or riding in a known stolen vehicle;
c. Person who is injured while in the commission of a felony;
d. A pedestrian injured outside of Maryland who is not a Maryland resident;
e. Motorcycles (may be excluded);
f. Named insured if occupying uninsured motor vehicle that is owned by the named insured or member of the immediate family residing in the household;
g. State Owned Vehicles (Not required to Maintain PIP);
h. Buses (Not required to Maintain PIP);
i. Taxicabs (Not required to Maintain PIP).

5. Subrogation

An insurer that provides PIP benefits does not have a right of subrogation and does not have a claim against any other person or insurer to recover any benefits paid because of the alleged fault of the other person in causing or contributing to a motor vehicle accident. See Md. Code Ann., Ins. § 19-507(d).

D. Insurance on Leased Vehicles

When an agreement to lease a vehicle exceeds 180 days, the owner of the motor vehicle may require the lessee to obtain insurance on the vehicle. See Code of Maryland Regulations 11.18.01.03.

E. Non-Permissive Operator

1. Named Driver Exclusion

The named driver exclusion is quite powerful. When the named excluded driver is operating the motor vehicle, all coverage (liability, collision, uninsured motorist, personal injury protection, med-pay, comprehensive, etc.) is eliminated. The named driver exclusion cannot be circumvented by a contention that the owner or named insured gave the named excluded driver permission to use the vehicle. See *Nationwide Mutual Insurance Co. v. Miller*, 305 Md. 614, 505 A.2d 1338 (1986).

2. Non-Permissive Use Exclusion

Non-Permissive Use exclusions are generally upheld. Maryland applies a "state of mind of the user" test. See *General Accident Fire & Life Assurance Corp. v. Perry*, 75 Md. App. 503, 541 A.2d 1340 (1988). The focus is on "the state of mind of the user," and not on permission. Under the "state of mind" approach, it is irrelevant whether the driver of the vehicle was actually "entitled" to drive because he had permission, consent, a license, a learner's permit, an ownership interest in the vehicle or some other color of authority. What is relevant is whether the driver *believed* he was entitled to drive. Id. at 521, 541 A.2d at 1348 (emphasis in original).

IX. IMPORTANT ISSUES/INFORMATION FOR INSURERS

A. Direct Action Statute

In general, no direct action lies against an insurer prior to determination of liability of an insured. See *McCormick v. St. Francis De Sales Church*, 219 Md. 422, 149 A.2d 768 (1958); *Washington Metro Area Transit Authority. Queen*, 324
Md. 326, 597 A.2d 423 (1991).

In accordance with a policy provision, an injured person may assert a right of action against an insurer in case of the insured's insolvency or bankruptcy. See *USF&G v. Williams*, 148 Md. 289 (1925).

B. Duty to Defend

The duty to defend is separate from and broader than the duty to indemnify. The duty to defend is triggered if the allegations in the complaint raise the potentiality that the claim may be covered by the policy. Any doubt as to whether there is a potentiality of coverage under an insurance policy will be resolved in favor of the insured. Once there is a potentiality of coverage, the insurer is obligated to defend the entire suit until such time, if ever, that the claims have been limited to ones outside the policy coverage. If an insurer refuses to defend on behalf of the insured, the insured is liable for damages incurred by the insured as a result of the insurer's breach of its obligation to defend. These damages generally include the amount of judgment or settlement, the costs of litigation, and attorney's fees. See *Brohawn v. Transamerica Ins. Co.*, 276 Md. 396, 347 A.2d 842 (1975).

There may be a duty to defend before receiving notice of the suit in certain circumstances. See *Sherwood Brands, Inc. v. Hartford Accident and Indemnity Co.*, 347 Md. 32, 698 A.2d 1078 (1997).

C. Bad Faith

1. Excess Liability Judgment

Maryland recognizes a cause of action brought in tort for bad faith refusal to settle a claim within policy limits. See *State Farm v. White*, 248 Md. 324, 236 A.2d 269 (1967). An insurer does not have an absolute duty to settle a claim within policy limits, although it may not refuse to do so in bad faith. See *Allstate Ins. Co. v. Campbell*, 334 Md. 381, 639 A.2d 652 (1994).

When there is an opportunity to settle a claim within the limits of the policy, the court adopts a "good faith" theory based upon a recognition that the insurer had exclusive control of the defense of a claim, thus has a tort duty to exercise good faith in making a decision not to settle a claim within policy limits. See id. at 329. This good faith standard requires that an insurer's refusal to settle a claim within policy limits be an informed judgment based upon honesty and diligence. See id. at 333. The court looks to the severity of the plaintiff's injuries, lack of proper and adequate investigation of the accident, lack of skillful evaluation of plaintiff's disability, failure of the insurer to inform the insured of a compromise offer within or near the policy limits, pressure by the insurer on the insured to make a contribution towards a compromise settlement within the policy limits, and actions which demonstrate a greater concern for the insurer's monetary interests than the financial risk attendant to the insured's predicament. See id.

2. Damages

Maryland follows the majority rule, which is that the measure of damages in a bad faith failure to settle case is the amount by which the judgment rendered in the underlying action exceeds the amount of insurance coverage. See *Medical Mutual Liab. Ins. Society Of Maryland v. Evans*, 330 Md. 1, 622 A.2d 103 (1993).

3. First Party Bad Faith

A tort action does not exist against an insurer for bad-faith failure to pay first-party insurance claim. See *Johnson v. Federal Kemper Ins. Co.*, 74 Md. App. 243, 536 A.2d 1211, cert. denied, 542 A.2d 844, 313 Md. 8 (1988).

However, effective October 1, 2007, Maryland enacted new legislation providing for an insured to seek administrative or judicial unfair claim settlement practice and it is a violation of Maryland law for an insurer to fail to act in good faith in settling a first-party claim under a policy of property and casualty insurance. See Md. Code Ann., Ins. § 27-303.

"Good faith" is defined as "an informed judgment based on honesty and diligence supported by evidence the insurer knew or should have known at the time the insurer made a decision on a claim." Md. Code Ann., Ins. § 27-1001(a). An insurer may not, however, be found to have failed to act in good faith solely on the basis of delay in determining coverage or the extent of payment to which the insured is entitled, if the insurer acted within the time period specified by statute or regulation for investigation of a claim by an insurer. See Md. Code Ann., Ins. § 27-1001(2)(e)(ii)(3).

In addition to creating civil and Administrative remedies, the new law also permits the Insurance Commissioner to impose a penalty on an insurer up to $125,000.00 for certain failures to act in good faith. The Commissioner may also require restitution to an insured for actual damages, expenses and litigation costs, including attorneys' fees and interest. Md. Ins. Code Ann § 27-305.

4. Third Party Bad Faith

Generally, no action by the injured party may lie against a third party insurance carrier for failure to pay a third party claim. The third party must obtain judgment against the third party, and then may seek judgment as an attachment or via a valid assignment of rights under the policy. Generally, a claimant has no direct cause of action against an insurer for sums in excess of the policy limit, absent "explicit authorization." An insurer owes no duty to a claimant to settle a claim; such obligations run only to the insured. See *Bean v. Allstate*, 285 Md. 572, 403 A.2d 793 (1979).

D. Negotiating Directly with Attorneys

There are no provisions in Maryland prohibiting claims representatives from negotiating directly with a plaintiff's attorney after suit is filed.

E. Releases

1. Release of One Party as to All Parties

Unless the document specifically provides for release of all tortfeasors, a

release discharges the obligations of only the party to the release. A release which provides for release of "all other persons, firms and corporations," discharges all other tortfeasors, even if unnamed in the document. See *Ralkey v. 3M*, 63 Md. App. 515, 492 A.2d 1358 (1985). Uniform Contribution Among Tortfeasors Act, Md. Code Ann. Cts. & Jud. Proc., §13-401 *et seq*.

The Act does not apply to punitive damages. It only applies to compensatory damages, where there is common liability among joint tortfeasors. See *Exxon Corp. v. Yarema*, 69 Md. App. 124, 516 A.2d 990 (1986); *Owens-Illinois v. Armstrong*, 326 Md. 107, 604 A.2d 47, cert. denied 506 U.S. 871, 113 S. Ct. 204, 121 L. Ed. 2d 145 (1992).

Furthermore, releases which clearly release "all claims" against a named tortfeasor, but are silent as to other tortfeasors, do NOT constitute a release as to the joint tortfeasors. See *Cupidon v. Alexis*, 335 Md. 230, 643 A.2d 385 (1994).

2. Voidable Releases

Since October 2007, any release signed by an injured individual for damages resulting from a tort, within thirty (30) days of the infliction of the injury, is voidable at the option of the injured person, within sixty (60) days of signing the release, so long as they are not represented by counsel at the time of signing the release. Notice voiding the release must be in writing, accompanied with return of any money paid, in which case the release is void from the date of mailing.

3. Covenants Not to Sue

Releases are construed according to the rules governing interpretation of contracts, and the intentions of the parties control. Therefore, anything the parties agree to and set forth in the agreement will govern the interpretation of the covenant. A release which specifically sets forth claims that the releasor agrees not to pursue, bars the releasor from later asserting that same claim. See *O'Shea v. Commercial Credit Corp.*, 734 F. Supp. 218 (1990), aff'd 930 F.2d 358 (4th Cir.), cert. denied 112 S. Ct. 177 (1991).

F. Reservation of Rights

1. Time Frames

Notice of a Reservation of Rights by an insurer to an insured must be accomplished "as soon as practicable." An examination of this time period will begin and end with the policy of insurance itself. If no affirmative duty is imposed by the policy for the notice period of a reservation or a withdrawal of coverage, then the time frame for providing such notice is "short of such a period as would constitute a waiver of the notice condition, or estop the Company from asserting it as a defense." *Watson v. United States Fidelity and Guaranty Co.*, 231 Md. 266, 272, 189 A.2d 625 (1963).

2. Specific Language Requirement

Reservations of Rights are not release, but covenants not to sue. Releases are treated like contracts, so if the language is clear as to the intent of the parties, the reservation will be enforced. Specifically detailing those rights reserved will generally lead to enforcement of the agreement. See *Kramer v. Emche*, 64 Md. App. 27, 494 A.2d 225 (1985). However, if the intent of the parties can be clearly ascertained to include a foreclosing of some future claim, then that will be upheld as a right reserved as well. See *Mraz v. Canadian Universal Ins.*, 804 F.2d 1325 (4th Cir. 1986).

G. Subrogation

Generally, an insurer is entitled to subrogate claims of its insured against others once the insurer has indemnified the loss of the insured. See *Travelers Indemnity v. North America*, 69 Md. App. 664, 519 A.2d 760 (1987). An insurer is not necessarily entitled to subrogation as a matter of legal right if there are intervening equities. See *Security Insurance v Mangan*, 250 Md. 241, 242 A.2d 482 (1968). An insurer paying personal injury protection benefits has no right of subrogation and no claim against any other person or insurer to recover any benefits paid by reason of the alleged fault of such other person in causing or contributing to the accident. See Md. Code Ann., Ins., § 19-507(d). The subrogation right does include, however, the insured's right to recover the costs of prosecuting a declaratory action against a second insurer who wrongfully refused to provide a defense. See *Travelers Indemnity v. Ins. of North America*, 69 Md. App. 664, 519 A.2d 760 (1987).

X. MISCELLANEOUS RULES

A. Joint and Several Liability

Joint Tortfeasor liability is governed by the Uniform Contribution Among Tortfeasors Act, Md. Code Ann. Cts. & Jud. Proc., §3-1401 *et seq*. The statute provides for a reduction in the total claim of the injured party by the greater of either the consideration paid upon release, or the amount or ratio/proportion provided for in the release agreement. A joint tortfeasor may totally avoid the common law joint and several liability rule by settling with the plaintiff under a release in terms of the Uniform Act. Any right of contribution a non-releasing tortfeasor may have may be extinguished under the Uniform Act, if the release is given before that non-releasing tortfeasor's right to contribution has accrued *and* the release provides for a reduction of the injured party's damages recoverable against all other tortfeasors.

B. Liens

1. Hospital Liens

Section 16-602 of the Commercial Law Article of the Annotated Code of Maryland requires a hospital to file a notice of lien with the clerk of the circuit court of the county where the medical or other services were provided. The hospital has a lien on 50 percent of the recovery or sum which the patient collects in judgment, settlement, or compromise of the patient's claim against another for damages on account of the injuries. The charges secured may not exceed those allowed by the State Workers' Compensation Commission for medical services rendered to individuals coming under the Maryland Workers' Compensation Act. The hospital must send a copy of the notice of lien and a statement of the date of its filing by registered or certified mail to the person alleged to be liable for the injuries received by the patient. The hospital's lien is subordinate only to an attorney's lien for professional services for collecting or obtaining damages.

Section 16-602(b) requires that the notice of lien be in writing and shall contain: (1) the name and address of the injured patient; (2) the date of the accident; (3) the name and location of the hospital; (4) the amount claimed; and (5) the name of the person alleged to be liable for the injuries received. Finally, § 16-602(c) requires that the hospital send a copy of the notice of lien by registered or certified mail to any insurance carrier known to insure the person alleged to be liable for the injuries received by the patient.

2. Penalty or Obligation For Failure to Honor Hospital Lien

Section 16-603 provides that if any person makes any payment to the patient, his attorney, heirs, or personal representative as compensation for the injuries, without paying the hospital the amount of the lien or as much of the lien as may be satisfied by any money due under any final judgment or under any compromise or settlement agreement after paying the amount of any prior lien, he is liable to the hospital for a period of one year from the date of making payment to the patient.

3. Other Medical Providers

There are no statutory lien provisions for individual medical providers. There is no common law lien afforded to a medical provider who renders care to an injured person.

4. Workers' Compensation

The workers compensation carrier has a statutory lien against any recovery made by the injured worker against a third party. If the worker settles a third

party claim without notification or approval of the employer/insurer, the Court of Appeals has held that by settling the claim without authorization from the employer/insurer, the employer/insurer would receive a credit equal to any prejudice that it could demonstrate it suffered as a result of the unauthorized settlement. See *Franch v. Ankey*, 341 Md. 350 (1996).

C. Minors

The parent, guardian or fiduciary of a minor is eligible to bring suit on behalf of the minor, as the 'next friend' of the minor. A guardian may be court appointed or designated by the minor if the minor is at least sixteen years old and, in the opinion of the court, has sufficient mental capacity to make an intelligent choice at the time the minor executes the designation. See Md. Code Ann., Est. & Trusts §§ 13-207, 13-213, 15-102 (p) (1991 & 1996 Supp.). Parents are the natural guardians of their children and therefore can file suit on behalf of their children. See Md. Code Ann., Fam. Law § 5-203 (1991 & 1996 Supp.). A court approved settlement is only ever required in the event that the minor's parents cannot or will not approve the settlement. See Md. Code Ann., Cts. & Jud. Proc. Art., §6- 405.

Parents are generally not liable for the tortious or intentional wrongful acts of their minor children absent inducement, approval or agency. See *Lanterman v. Wilson*, 277 Md. 364 (1976). However, if a child is found to be delinquent under state juvenile laws, the child and/or parent(s) can be ordered to pay restitution up to a maximum of $10,000.00 for each delinquent act. See Md. Code, Cts. & Jud. P. Art. § 11-601 *et seq*. The victim can make representations to the prosecutor and juvenile court as to restitution, but has no standing or right to directly seek restitution. See *Hart v. Bull*, 69 Md.App. 229 (1986); *Lopez-Sanchez v. State*, 155 Md.App. 580 (2004)

D. Offer of Judgment

With the exception of suits involving claims of medical malpractice, Maryland does not have an Offer of Judgment provision. Therefore, in the event that the judgment obtained is less than the offer made, a party is not entitled to the costs incurred after making the offer.

E. Recorded Statements

1. Generally

Maryland Rule 2-402 provides that a party may obtain a statement concerning the action or its subject matter previously made by that party. A person who is not a party may obtain,or may authorize in writing a party to obtain, a statement concerning the action or its subject matter previously made by that person. Neither of these requests need to be supported by the "substantial need" or "undue hardship" tests. For the disclosure of investigatory materials generally, see *Kelch v. Mass Transit Adm.*, 287 Md. 223, 411 A.2d 449 (1980). It is illegal to tape record another's statement without their knowledge or consent.

2. Admissibility in Court

Generally, a recorded statement is admissible for impeachment purposes under Maryland Rule 5-613. It is also admissible as substantive evidence as an admission if it is of a party opponent. The proper foundation for the authentication of the document should be laid, most likely by the person that took the statement. An argument could be made that the statement is self-authenticating under Rule 5-902(a)(11), if certified.

F. Res Judicata and Collateral Estoppel

The doctrine of res judicata is that a judgment between the same parties and their privies is a final bar to any other suit upon the same cause of action, and is conclusive, not only as to all matters that have been decided in the original suit, but as to all matters which with propriety could have been litigated in the first suit. See *Alvey v. Alvey*, 225 Md. 386, 390, 171 A.2d 92 (1961). Collateral estoppel involves preclusion of a claim when the material issue has been litigated and decided in a prior suit, though that prior suit may have involved a completely different cause of action. See *Myers v. State*, 57 Md. App. 325, 327, 470 A.2d 355 (1984).

G. Seat Belt Statute

Maryland law requires the operator of a vehicle and any occupant under 16 years old to use a seat belt or child safety seat. See Md. Code Ann., Transp., § 22 412.3(b). Any person over 16 years old must be restrained by a seat belt if traveling in the front seat and next to a door. See Md. Code Ann., Transp., § 22-412.3(c). However, the same law expressly prohibits an individual's failure to use a seat belt from being considered evidence of negligence, contributory negligence, or to limit damages. See Md. Code Ann., Transp., § 22-412.3(h).

H. Admissibility of Traffic Citations in Civil Cases

Whether the disposition of a traffic citation will be admissible in a subsequent civil case, arising from the same incident, will depend, in large part, on the manner in which the accused/civil defendant has dealt with the citation. It is well established in Maryland that a guilty plea entered in traffic court is admissible in a subsequent civil suit arising from the same occurrence. See *Miller v. Hall*, 161 Md. 111, 155 A. 327 (1931)(holding that the testimony of the defendant in the earlier criminal case, pleading guilty in traffic court to a failure to yield the right of way, was an admission of fault and relevant at the subsequent civil trial for his negligence); see also *Camfield v. Crowther*, 252 Md. 88, 249 A.2d 168 (1969) (holding that a guilty plea to a criminal charge may be introduced in a subsequent civil proceeding as an admission). It is as equally well established, that only a guilty plea entered in open court is so admissible. It will not be admissible, as an admission, if the accused/civil defendant either pays a fine in lieu of appearing at court, or pleads not guilty and is found guilty following the trial. See *Briggeman v. Albert*, 322 Md. 133, 136, 586 A.2d 15 (1991) (holding that payment of a traffic fine is neither a guilty plea, nor an express acknowledgment of guilt and has no relevance to the subsequent civil proceedings, as it "is not the evidentiary equivalent of a guilty plea in open court"); accord *Crane v. Dunn*, 2004 WL 1646479 (2004) (holding that an agreed plea to

certain charges, in exchange for dropping others, was still a plea of guilty in open court, and it was error to exclude this evidence, which was admissible in the subsequent civil trial).

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