

# THE LORD & WHIP REPORT

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## *Court of Appeals Abandons Requirement That Injury Result From Unusual Activity*

By: Brigitte J. Gardenier

In what appears to be the most significant workers' compensation decision in decades, the Court of Appeals, in *Harris v. Board of Education of Howard County*, overturned a long line of cases to eliminate the requirement that an injury arise from an "unusual activity" to be compensable. 825 A.2d 365, 2003 LEXIS 309 \*1 (2003). This decision means that a large number of claims, previously held to be non-compensable, could be found to arise out of and in the course of employment. 825 A.2d 365, 2003 LEXIS 309 \*1 (2003).

For 75 years courts in Maryland "requir[ed] that an accidental personal injury arise out of 'unusual' activity for there to be coverage" under workers' compensation statutes. *Id.* at \*1. The *Harris* Court held that the "unusual activity" requirement was not contemplated in the statute and was added to the law by a previous decision of the Court of Appeals in *Slacum v. Jolley*, 153 Md. 343, 138 A. 244 (1927). The *Slacum* decision noted that the Claimant must prove an "accidental injury" resulting from "unusual activity" to have a compensable claim. Departing from decades of decisions relying on *Slacum* and its progeny, the Court said that it will "neither add nor delete words in order to give the statute meaning not otherwise communicated by the language used. *See Harris* at \*1 (citing *Blind Industries v. Department of General Services*, 371 Md. 221, 231, 808 A.2d 782, 788 (2002)).

The *Harris* court also reasoned that the requirement of "unusual activity" in accidental injury cases was not uniformly applied, and "[in] other areas of

law, where a judicially created standard has not been uniformly followed, has been inconsistently applied, and has treated differently persons who were similarly situated, this Court has not hesitated to change or abandon the standard." *Harris* at \*46. The Court pointed to several judicially created standards that were overruled and abandoned, including cases involving punitive damages based on "implied malice"; preclusion of appeals to correct incorrect sentences; and cases involving the doctrine of inter-spousal immunity. *See Id.* at \*47. It is noteworthy that the Court referred to judicially created standards that were applied retroactively. It may be that *Harris* will also be applied retroactively.

Courts in Maryland have always determined the applicability of judicially created laws on a case by case basis. In *Boblitz v. Boblitz*, the Court of Appeals did away with inter-spousal immunity in negligence actions. 296 Md. 242, 462 A.2d 506. The court applied the new law to Mr. and Mrs. Boblitz and made it clear that the new law was applicable to all causes of action that arose after the date of the decision. *See Id.*

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The *Harris* case is similar to the *Boblitz* case in that the Court of Appeals applied the newly created law to Ms. Harris and found her accidental injury case to be compensable. In both cases the courts of Maryland had to determine how to apply the new laws to cases where the date of accident occurred before the date of the decision, but in cases where the issue is involved in pending litigation in cases yet to be filed.

The Court of Special Appeals resolved the retroactivity issue with regard to interspousal immunity in negligence cases in *Rhee v. Combined Enterprises, Inc.*, 74 Md. App. 214, 536 A.2d 1197 (1988). The appellate court held that a husband could pursue a tort suit action against his wife, despite the fact that the date of the subject accident, May 15, 1983, predated the *Boblitz* decision of June 30, 1983. In so ruling, the *Rhee* court discussed the rationale and pointed out that judicially changed standards may be applied in one of three ways: purely prospectively; prospectively and to the parties in the pending litigation; or retroactively. *Id.* The *Rhee* court opined that when deciding how to apply new laws, the court must look at the consequences of retroactive versus prospective application. *Id.*

While the *Rhee* court's discussion of these issues is instructive in determining *Harris* will be applied retroactively in accidental injury cases, it is not dispositive of the issue. One must also consider the unique status afforded to judge made law in Maryland. Judge-made law, like that espoused in *Harris*, has no date of enactment, and "[r]ules of construction and constitutional limitations against retroactive legislation are not applicable to judicial decisions." See *Fletcher v. Safe Deposit and Trust Co.*, 193 Md. 400, 410, 67 A.2d 386, 390 (1949). In fact, when courts overrule their own decisions, they "declare" the law as it has been since the beginning. *Id.*

Although judge-made law can be retroactively applied, courts must apply the law in a manner that avoids injustice and hardship on the part of the employer and insurer, as well as the claimant. The notion that judge made law has no effective date, and thus can be applied fully retroactively, may suggest that *Harris* will be applied retroactively.

The effects of *Harris* on workers' compensation law are not clear. A community-wide discussion has begun between claimant's attorneys, defense lawyers, insurance companies and members of the legislature. Even Maryland Governor Robert Ehrlich has taken part in the discussion about *Harris*. As the keynote speaker at the 2003 Maryland Workers' Compensation Annual Conference, Governor Ehrlich spoke about the new change in the law and the possible consequences. In his remarks on Monday, September 22, 2003, Governor Ehrlich indicated that in 1999, nearly four years ago, eliminating the "unusual activity" requirement for compensable accidental injuries would have led to a 20 percent increase in claims and an increase of over one million dollars payable in benefits per year. He spoke about two possible solutions that have been proposed to limit the effect of *Harris* on the workers' compensation community: codifying the "unusual activity" requirement or limiting the amount of benefits available to each claimant.

Draft legislation is being prepared by both claimant's attorneys and defense counsel for submission to the Legislature in Spring 2004. While it remains to be seen what, if any, legislation will pass next year one thing is for certain- every worker, employer, and insurance company will feel the effects of the *Harris* decision, so it is important to understand its likely application to Workers' Compensation claims filed in Maryland.

## **NEW STATUTE OF LIMITATIONS FOR MINORS IN MEDICAL MALPRACTICE CLAIMS**

By: Jennifer S. Lubinski

The Court of Appeals has overruled the statute of limitations applicable to minors in medical malpractice claims enacted as a corollary to the Health Claims Arbitration Act. In *Piselli v. 75<sup>th</sup> Street Medical*, 371 Md. 188 (2002), the Court ruled that the statute will not begin to run until a minor reaches the age of majority. *Id.* at 219.

Statutes of limitations operate to protect defendants; public policy requires that claims be filed within a reasonable period of time so that they can be defended while evidence is still fresh and witnesses are available. *Doughty v. Prettyman*, 219 Md. 83, 93 (1959); *Johns Hopkins Hospital v. Lehninger*, 48 Md. App. 549, 561 (1981). Generally, in tort claims, the

statute of limitations begins to run when a claimant "knew or should have known" that he suffered an injury. *Hill v. Fitzgerald*, 304 Md. 689 (1985); *Poffenberger v. Risser*, 290 Md. 631 (1981); *Waldman v. Rohrbaugh*, 241 Md. 137 (1966); *Lutheran Hospital v. Levy*, 60 Md. App. 227 (1984), cert. denied, 302 Md. 288 (1985); *Russo v. Ascher*, 76 Md. App. 465 (1988). This is known as the "discovery rule." *Russo*, 76 Md. App. at 465.

Historically, courts have recognized an exception to statutes of limitation in cases involving minors. *Piselli*, 371 Md. at 212. At common law, the statute of limitations did not begin to run until a minor reached the age of majority. *Id.* at

212-13. In Maryland, that exception is codified at § 5-201(a) of the Courts and Judicial Proceedings Article of the Annotated Code.

In 1976, responding to calls for medical malpractice litigation reform, the Maryland Legislature significantly changed the procedures governing medical malpractice claims, providing, among other things, for the submission of all claims to mandatory non-binding arbitration. See § 3-2A-201 *et seq.* (the “Health Claims Arbitration Act”); *Hill v. Fitzgerald*, 304 Md. 689, 699-700 (1985). As a part of that statutory scheme, the Legislature enacted a statute of limitations specifically tailored to medical malpractice claims. *Edmonds v. Cytology Servs.*, 111 Md. App. 233, 245 (1996), *aff’d sub. nom. Rivera v. Edmonds*, 347 Md. 208 (1997). The statute provided that any claim for malpractice must be filed by the *earlier* of (1) three years from the date of discovery of an injury, *or* five years from the date of the alleged negligent act. ANN. CODE OF MD., CTS. & JUD. PROC § 5-109(a). The Act created an absolute five year statute of repose, barring claims not filed within five years of injury, regardless of whether the claimant discovered the injury. *Hill*, 304 Md. at 699-700. § 5-109 thereby limited the operation of the discovery rule with respect to medical malpractice cases in Maryland. *Id.*

In addition, the malpractice statute of limitations contained the following provision with respect to minors’ claims:

§ 5-109. Actions against health care providers.

(a) *Limitations.* — [omitted]

(b) *Actions by claimants under age*]]. — Except as provided in subsection

(c) of this section, if the claimant was under the age of 11 years at the time the injury was committed, the time limitations prescribed in subsection (a) of this section shall commence when the claimant reaches the age of 11 years.

(d) *Exceptions to age limitations in certain actions.* —

(1) The provisions of subsection (b) of this section may not be applied to an action for damages for an injury:

(i) To the reproductive system of the claimant; or

(ii) Caused by a foreign object negligently left in the claimant’s body.

(2) In an action for damages for an injury described in this subsection, if the claimant was under the age of 16 years at the time the injury was committed, the time limitations prescribed in subsection (a) of this section shall commence when the claimant reaches the age of 16 years.

The statute therefore eliminated the common law rule that limitations would not begin until the minor reached the age of majority, and provided that, with limited exceptions, the statute of limitations on a minor’s malpractice claim would begin to run on the child’s eleventh birthday. The provisions of §5-109 dealing with minors have been overruled by the Court in *Piselli*.

The case arose in 1993 when Christopher Piselli, just under eleven years old, was vacationing with his parents in Ocean City, Maryland. *Piselli*, 371 Md. at 194-95. His father noticed him walking with a limp and took him to the 75<sup>th</sup> Street Medical Center. *Id.* A physician at the clinic ordered an x-ray and advised Christopher that he most likely had a pulled hamstring. *Id.* at 195. Three days later, Christopher fell and was taken to a local hospital, where he was transferred to Johns Hopkins Hospital. *Id.* There, Christopher was advised he had injured the growth plate at the ball of his hip joint. *Id.* Although he received treatment for the injury, he subsequently developed avascular necrosis, a condition that resulted in a leg length disparity. *Id.* at 195-96. Christopher’s parents filed suit in the United States District Court for Maryland in 1998. *Id.* at 196.

The case reached the Maryland Court of Appeals via certified question, a procedure that allows a court to answer a question posed by another court. *Id.* at 193. The Federal Court asked the Court of Appeals to advise it whether, under Maryland law, the three year period in §5-109 began to run when Christopher’s parents discovered the injury or when Christopher discovered the injury. *Id.* The claim would have been time-barred if the former interpretation was correct. *Id.* at 197.

The Court of Appeals skirted the question, however, and instead ruled that the entire statutory scheme was unconstitutional with respect to minors. *Id.* at 215. The Court’s analysis turned on Article 19 of the Maryland Declaration of Rights, which generally prohibits unreasonable restraints on traditional remedies or access to the courts. *Id.* at 205-06; *Johnson v. Maryland State Police*, 331 Md. 285, 297 (1993). In fact, according to the Court, the medical malpractice statutory five year statute of repose was such a legislative remedy, and did not violate Article 19, *as it applied to adults.* *Id.* at 207-08; *Hill*, 304 Md. at 703-05.

As applied to minors, the Court reasoned, the statute unreasonably restricted access to the courts because it placed responsibility for bringing the claim squarely within the parent or guardian's control. *Id.* at 215. If the parent or guardian neglected to timely file a claim, the minor would suffer the consequences. *Id.* at 215-16. In addition, some children lack a parent or guardian to bring the claim, and the statute made no special arrangements for them. *Id.* at 217. Instead, the Court reinstated the common law rule that the statute of limitations begins to run when the minor reaches the age of majority. *Id.* at 219.

The Court's opinion leaves some interesting issues unaddressed. For one, the medical malpractice statute of limitations for adults survived a similar constitutional attack in *Hill v. Fitzgerald*, 304 Md. 689 (1985). The Court in *Piselli* acknowledged that other state courts reached different conclusions with respect to similar statutes, but declined to re-examine its holding in *Hill* because the parties did not ask them to. *Piselli*, 371 Md. 208 n.8. Notably, the *Hill* Court relied on *Attorney Gen'l v. Johnson*, 282 Md. 274 (1978), to hold that the change to the statute of limitations represented in § 5-109(a) did not unreasonably restrict access to the courts under Article 19. *Hill*, 304 Md. at 701-02. *Johnson* has since been overruled. See *American Union of Baptists v. Trustees of the Particular Primitive Baptist Church*, 335 Md. 564 (1994); *Newell v. Richards*, 323 Md. 717 (1991).

Second, the Court failed to explain the retroactive effect, if any, to be given its decision. New law, whether

legislative or judicial, may be applied prospectively, meaning only to cases filed after its effective date; or retroactively, meaning it affects cases decided before its effective date. See generally *Schiller v. Lefkowitz*, 242 Md. 461 (1966). If the Court's decision in *Piselli* is given retroactive application, it could disturb claims previously closed in reliance on §5-109(b) and (c).

Retroactive application is unlikely, as courts have traditionally hesitated to extend it to civil, as opposed to criminal, matters. *Schiller*, 242 Md. at 472-76. However, the issue remains to be raised. Without question, *Piselli* applies to those claims pending on and filed after October 8, 2002, the date of the Court's decision.

Lastly, during the most recent session, the Maryland General Assembly considered a bill that would have legislatively amended the *Piselli* decision. H.B. 676 provided that, if a claimant was under the age of eleven at the time of the injury, a claim for malpractice would have to be filed before the child reached the age of nineteen. Similarly, a claimant under the age of sixteen alleging injury to the reproductive system or caused by a foreign object left in the claimant's body would have been required to file a claim before reaching the age of twenty-one. H.B. 676(c). The statute also contained a clause clarifying its prospective-only application. H.B. 676(f)(2). The bill passed in the Maryland House of Representatives but apparently did not receive approval by the Senate Judicial Proceedings Committee.

## ***FALSE IMPRISONMENT:*** **Strategies for Defense**

By: Jeaneen J. Johnson

The tort of false imprisonment has enjoyed a long legal history in Maryland. Beginning with *Kirk v. Garrett*, 84 Md. 383 (1896), Maryland courts have examined the tort of false imprisonment and its elements. Almost from the very beginning, courts have held that to establish the tort of false imprisonment, the accuser must prove that there was a deprivation of his or her liberty without consent and that such deprivation was without legal justification. *Ashton v. Brown*, 339 Md. 70, 119, 660 A.2d 447 (1995) (citing *Great Atlantic & Pacific Tea Co. v. Paul*, 256 Md. 643, 654, 261 A. 2d 731 (1973)).

Deprivation exists when there is "some direct restraint of the person." *Mason v. Wrightson*, 205 Md. 481, 487, 109 A. 2d 128, 131 (1954). The Court of Appeals reasoned that "any exercise of force, or threat of force, by which in fact the other person is deprived of his [or her]

liberty, compelled to remain where he [or she] does not wish to remain, or to go where he [or she] does not wish to go, is an imprisonment." *Id.* Thus, to deprive another person of his or her liberty does not necessarily require a physical act of restraint. It may also be achieved using a threat of force or violence.

The legal justification requirement is a more complex issue. In *Great Atlantic & Pacific Tea Co. v. Paul*, *supra*, 256 Md. at 655, the court explained the concept of legal justification by saying that "when the cases speak of legal justification we read this as equivalent to legal authority.... Whatever technical distinction there may be between an 'arrest' and a 'detention' the test [of] whether legal justification existed in a particular case has been judged by the principles applicable to the law of arrest." The question of legal justification commonly arises when

merchants detain theft suspects and when police officers arrest the people merchants believe committed theft of goods or merchandise.

The Maryland Legislature enacted a statute to protect merchants against false imprisonment claims by persons they believe commit theft at their premises. This statute protects merchants from civil liability in cases where a person is believed to have committed theft of the merchant's property or goods is detained or arrested by the merchant, his/her employees or agents. The statute applies when the merchant or the merchant's employees or agents has probable cause to believe that a theft occurred or was going to occur in the absence of intervention.

Under Maryland law, probable cause is defined as "a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused is guilty; mere belief, however sincere, is not sufficient. There must be such grounds of belief founded upon actual knowledge of facts as would influence the mind of a reasonable person."

*Billy Rich Kimbro v. Giant Food, Inc.*, 26 Md. App. 640, 647, 339 A. 2d 688, 693 (1975). For probable cause to exist, the merchant or the merchant's employees or agents making the arrest must have sufficient facts, at the time of the arrest or detention, that would allow a reasonable person to believe that goods or property were stolen or misappropriated. The person making the arrest is not required to have knowledge that the goods or property were lawfully possessed or owned by the merchant, but must have a reasonable belief that this is the case. *Nilson v. State*, 272 Md. 179, 184, 321 A. 2d 301, 304 (1974).

The deprivation of another person's liberty without consent and without legal justification may render the arresting person liable for damages "as the jury may consider actual compensation for the unlawful invasion of the [person's] rights and the injury to his [or her] person and feelings." *Great Atlantic & Pacific Tea Co. v. Paul*, supra, 256 Md. at 739. If the jury finds that the act was inflicted maliciously, willfully or wantonly, not only may compensatory damages be awarded, but punitive damages may also be awarded. *Id.*

To support an award of punitive damages, "actual malice" must be proven. "Actual malice" refers to conduct characterized by evil or wrongful motive, intent to injure, knowing and deliberate wrongdoing, ill will or fraud. *Owens-Illinois v. Zenobia*, 325 Md. 420, 601 A. 2d 633

(1992), and *Montgomery Ward v. Wilson*, 339 Md. 701, 729, 664 A.2d 916, 930 (1995). Facts showing "actual malice", maliciousness, willfulness or wantonness must be pleaded and proven by clear and convincing evidence. A specific demand for the recovery of punitive damages must be made before an award of such damages may be had. *Robert Scott v. Terry Napoleon Jenkins*, 345 Md. 21, 24, 690 A.2d 1000, 1008 (1997).

The most important protection you can provide your company against civil liability when an arrest or detention is made is to have loss prevention procedures in place. Merchants should have policies that address theft from their establishments and all employees should be trained to follow those policies.

Have your employees perform routine checks of your business on pre-set intervals. This will not only assist in the prevention of theft from your business, but will be helpful in proving that the person was not being targeted by your employees for any reason and that there was no malice, ill will or wrongful motive.

If your employees suspect someone of committing theft, train them to contact the manager on duty before approaching the person. This will give the manager the opportunity to confirm the employee's suspicions or conduct further investigation, if necessary.

Once the decision is made to detain someone suspected of committing theft, be professional and courteous when you approach the person. After the person is detained, discretely escort him or her to a private location without making physical contact if possible. Once the person is in a private location, call the authorities immediately. Maintain a list of telephone numbers of the authorities and make sure the list is easily accessible. This will help you to keep the detention as short as possible.

If a theft suspect is detained and merchandise or goods are not in plain view and the person refuses to allow you to search his/her bags or purses, do not search without permission. Inform the authorities when they arrive and allow them to handle it.

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## *OFfi CE nO? eS*

We are pleased to announce six (6) new additions to the law firm: **Jeaneen J. Johnson, Brigitte J. Gardenier, Jennifer S. Lubinski, Stephen W. Thibodeau, Thomas A. Gravely** and **Angela M. Garcia Kozlowski** all joined the firm as associate attorneys this year. **Jeaneen** comes to the firm after serving as an Assistant State's Attorney in Frederick County for four (4) years. Jeaneen will apply her litigation experience in the criminal, professional malpractice, products liability and general liability defense areas. . **Brigitte**, previously in private practice, will practice in the areas of workers' compensation and general liability defense. . **Jennifer** is experienced in the medical malpractice, insurance coverage, and general liability practice areas and will continue to serve the firm's clients in these areas. She is also Maryland Defense Counsel's Young Lawyers' DRI Representative . . **Steve** joins us after completing a clerkship with the Honorable Karen A. Murphy Jensen of the Circuit Court for Caroline County. He will practice primarily in the areas of products liability, commercial litigation, and general liability defense. . . **Angela** also joins us after finishing a clerkship with the Honorable Nancy L. Davis-Loomis of the Circuit Court for Anne Arundel County in Annapolis, Maryland. Angela, who speaks Spanish and French, will practice in the worker's compensation and

general liability areas. . **Tom**, who is admitted to practice in both Maryland and the District of Columbia, will practice in the products liability, professional malpractice and general liability areas. . . Congratulations to **Bob Erlandson** on his recent appointment as Chair of the Defense Research Institute's Workers' Compensation Committee. Bob was also appointed by Governor Ehrlich to serve on the Judicial Nominating Commission for Baltimore County, Maryland....**Paul Mullen** serves in the responsible post of Co-Chair of the Judiciary Committee of the Maryland State Bar Association. The Judiciary Committee interviews all candidates for judicial appointment statewide and makes recommendations to the Governor. . **Mike Daney** is honored to be elected Vice President of the Baltimore City Rotary Club and was reappointed Secretary of the Baltimore City Rotary Foundation...**Ed Ranier** was surprised and happy to be elected to the post of Vice President of the Automobile Funeral Association, an organization made up of Funeral Directors and Livery Car Providers. . . Finally, **Kathy Bustraan** is honored to serve as a mediator in the Circuit Court for Baltimore City's civil mediation program. In addition, Kathy continues to serve as Co-Chair of the Professional Liability Committee of Maryland Defense Counsel, Inc.

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