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Recent Developments

Maryland Courts

By Robert E. Cahill, Jr.

In *Embrey et. al. v. Holly*, ___ Md. ___, ___ A.2d ___ (1982), the Court of Appeals of Maryland upheld an award of punitive damages against an employer under the theory of *respondet superior* in a defamation case. The Court also decided that under appropriate circumstances, it is proper for a trial court to permit the jury to apportion punitive damages among multiple defendants.

The case involved a remark by Embrey, a radio D.J. more popularly known as Johnny Walker, during his morning broadcast on WFBR, in Baltimore. The target of the comment, then local news anchorman Dennis Holly, alleged damage to his reputation as a result of its broadcast. Suit was filed on his behalf against both Embrey and Baltimore Radio Show Inc., Embrey's employer. A jury in the Baltimore City Court found that the statement was defamatory, and awarded Holly, \$25,000.00 in compensatory damages against both defendants, as well as \$5,000.00 in punitive damages against Embrey and \$25,000.00 in punitive damages against the defendant employer.

On appeal, Embrey and Baltimore Radio Show conceded that Maryland has adopted the view allowing assessment of punitive damages in cases where liability is vicariously imposed upon a master as the result of the servant's tortious conduct in the course of employment, without regard to the master's involvement in the tortious act. However, they urged the Court to fashion an exception to the rule, thus prohibiting vicarious exemplary recovery in defamation cases. Embrey and his employer argued that to allow recovery against the master in such a case would offend the spirit



of the first amendment guarantee of freedom of expression, and would violate the prohibition against imposing "liability without fault" in defamation cases announced by the Supreme Court in *Gertz v. Robert Welch, Inc.* 418 U.S. 323 (1974).

The court held, however, that "it is not error to permit the jury to impose exemplary liability on a master for the defamatory utterances of its servant where the employee acted in the scope of his employment, and with knowledge of falsity or reckless disregard for the truth." In so holding, the Court reasoned that the *Gertz* decision left state courts sufficient leeway to impose vicarious liability in defamation cases, stating that "there is no constitutional shield under *Gertz* for an employer acting through his agent with actual malice, because the employer in such a situation is the wrongdoer."

The Court further reasoned that

allowing a punitive damage assessment against an employer in such a situation will serve to encourage greater employer accountability, thus protecting the interests of Maryland citizens in their reputations.

Finally, the Court noted the lack of any constitutional distinction between an award of punitive damages and one of compensatory damages based on vicarious liability, the latter being clearly permissible.

The Court also deemed this an appropriate case to permit apportionment of punitive damages among the co-defendants. In so holding, the Court cited the admissibility of evidence as to the wealth, and the blameworthiness of each co-defendant as weighing heavily in favor of a rule that would allow a punitive award against each co-defendant individually.

In his dissent, Chief Judge Murphy, joined by Judges Eldridge and Davidson, argued that the test for the imposition of punitive liability adopted by the RESTATEMENT (SECOND) OF TORTS §909 (1976), which requires some degree of employer "authorization, participation, or ratification of an employee's defamatory act" is constitutionally impelled" by the holding in *Gertz*. The thrust of the dissenting position centered upon a reading of *Gertz* that would require a finding of actual fault, as opposed to one of imputed fault before an award of punitive damages could be proper in a First Amendment case.

In *Adler v. American Standard Corporation*, 291 Md. 31, ___ A.2d ___ (1981), the Court of Appeals, upon having the question certified for its determination from the United States District Court for the District of Maryland, opened the door to a new cause of action in Maryland Courts: to wit, wrongful discharge by an employer of an at-will employee. While holding that the averments of Adler's Amended Complaint were conclusory, vague, and general, the Court recognized that an employee at will may sue his former employer either in tort or in contract for abusive discharge when the reason for the discharge contra-

venes "some clear mandate of public policy."

As the Court explained, Adler alleged that he was discharged solely on the basis of the corporation's desire to thwart Adler's efforts to disclose certain business improprieties which he had discovered within the company, including payment of commercial bribes, and the falsification of financial and other business records. Adler contended that since the acts which precipitated his discharge, namely commercial bribery and falsification of records are in violation of the criminal laws, *see* MD. ANN. CODE Art. 27 §174 (1982 rep. vol.), then a discharge to prevent disclosure of the crimes violates public policy.

The Court found that the allegations did not fully set forth facts amounting to a violation of the criminal statute. Further, found the Court, Adler's allegations did not otherwise "demonstrate violation of a clear mandate of public policy of this State." The Court noted that "declaration of public policy is normally the function of the legislative branch, 'and that' recognition of an otherwise undeclared public policy as a basis for a judicial decision involves the application of a very nebulous concept to the facts of

a given case." In short, the Court provides little guidance in defining the type of "clear mandate of public policy" that must be contravened by the employer in a proper allegation of wrongful discharge. For further analysis, *see* 10 U. of Balt. L. Rev. 256 (1981).

The Court of Special Appeals, *In Teays v. Supreme Concrete Block Inc.*, — Md. App. —, — A.2d — (1982), in holding that an aggrieved employee against whom a demurrer was sustained before the Adler decision was filed is entitled to the application of the new law on appeal, similarly found the plaintiff's declaration to be substantially insufficient in alleging that the motivation of the employer in discharging Teays contravened a clear mandate of public policy.

In *Felder v. Butler*, 292 Md. 174, — A.2d — (1981), the Court of Appeals declined to alter or to modify the common law rule prohibiting the imposition of dram shop liability upon a licensed vendor of intoxicating beverages who knowingly and unlawfully sells liquor to an intoxicated patron, who in turn, causes an injury to a third party.

The Court reasoned that since the

legislature has declined to enact a statute imposing civil liability on responsible liquor vendors, the policy demanded by the public is satisfied by the imposition of criminal sanctions upon vendors found guilty of selling intoxicants to minors or to intoxicated persons. *See* MARYLAND CODE ANN. Art 2B § 118(a)(1981 rep. vol.). The Court noted that the question "clearly impacts on the developments relating to the dispensing and consumption of alcoholic beverages, a subject long pervasively regulated by the legislature."

In her dissent, Judge Davidson argued that "the common law rule has become insound in the circumstances of modern life," and that the Court should not interpret legislative inaction as a positive revelation concerning Maryland public policy.

In *Sheehan v. Anthony Pools* — Md. App. —, — A.2nd — (1982), the plaintiff sued the seller of a swimming pool after he sustained personal injuries as the result of falling off of a diving board. Sheehan pursued his claim under two theories. First, he alleged breach of express and implied warranties that the diving board was covered with non-skid materials. Second, he alleged strict liability, claiming that he had been sold a defective pool and diving board which was unreasonably dangerous.

The trial court directed a verdict in favor of Anthony Pools as to the warranty claim, citing a provision in the sales contract which contained a disclaimer of implied warranties, and of any express warranties falling outside of the contract itself. In submitting the strict liability claim to a jury, the trial court refused to grant a prayer to the effect that inadvertence of carelessness in the use of the diving board by Sheehan was not a defense.

The Court of Special Appeals reversed. On the question of whether the attempted disclaimer effectively excluded the implied warranties of merchantability and fitness for purpose, the Court held that while generally the implied warranties may be excluded or modified, the provisions

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of MD. COM. L. CODE §2.316.1 (1975) prohibit enforcement of such an attempt, if asserted by a seller of consumer goods. The Court found Anthony Pools to be a "seller" (MD. COM. L. CODE §2-314 to 2-318), and the pool itself to be a "consumer good" (MD. COM. L. CODE §9-109), within the meaning of the statute.

The Court also held that the judge's refusal to instruct the jury that carelessness in the use of the diving board by Sheehan did not constitute a valid defense to the strict liability claim was reversible error. Noting first that the trial judge properly refused Anthony Pools' request for a contributory negligence instruction, the Court indicated that the appropriate jury charge should have included an instruction to the effect that ordinary carelessness or inadvertence on the part of Sheehan would not bar his recovery, but that a knowing, voluntary and unreasonable assumption of the risk involved in the use of the diving board would provide a complete defense. See RESTATEMENT (SECOND) OF TORTS §402A (1976). The Court concluded that "the trial court's silence on these two aspects of the plaintiff's conduct left the jury bereft of essential guidance and constituted reversible error."

Recent Maryland Legislative Developments:

- the bill seeking to raise gasoline taxes 4.5 cents per gallon over the next two years passed. If the wholesale price of unleaded gasoline rises above \$1.30, the tax will increase automatically, but by no more than \$.01 per year. Such revenue will be used to repair and replace Maryland's deteriorating highways and bridges.
- the State's drinking age for the consumption of beer and wine will be raised from 18 years of age to 21 years of age. The bill exempts all people who will be 18 by June 30, 1982. The primary motivation for

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- raising the drinking age was to reduce the number of automobile accidents caused by intoxicated motorists. The drinking age for beer and wine was lowered from 21 to 18 in 1974.
- the "Death with Dignity" bill which would have allowed terminally ill patients to instruct doctors not to take extraordinary measures to prolong life where there is no hope of cure did not pass. Opponents of this bill felt that it would only legalize mercy killing.
 - the bill seeking to "decouple" state taxes from federal taxes which have made allowances providing tax breaks for businesses, was shelved until next year.
 - the bill to raise interest rate ceilings on most consumer loans, raising the ceiling to 24% passed. Opponents of the deregulation bill were successful only in amending the bill to continue the state ban on credit card membership fees. On January 28, 1981, Judge Marshall A. Levin of the Supreme Bench of Baltimore City, ruled that the State no longer has the right to impose interest ceilings because of federal deregulation. Judge Levin's decision will be

considered on appeal to the Maryland Court of Appeals this year.

- the bill seeking to raise interest ceilings to 24% on secondary mortgages passed.
- the bill proposing mandatory sentencing for unlawful possession of a handgun was killed in the Judiciary Committee.
- the General Assembly agreed to raise weekly unemployment benefits from \$140 per week to \$153 per week.
- the bill that would prevent the courts from automatically dismissing criminal cases that take more than 180 days to get to trial was killed in the final hours of the session.
- the bill giving state's attorneys the discretion to determine whether 16 or 17 year-olds charged with violent crimes should be tried as juveniles or adults, passed.
- the legislature acted to extinguish the possibility of obtaining uncontested divorces without going to court, a method recently approved by the Maryland Court of Appeals. Proposals to reduce the separation period necessary to file for divorce were also defeated.