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Recent Developments: Alexander & Alexander v. Evander & Assoc., Inc.: Court of Special Appeals Vacates State's Largest Punitive Award

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mary judgment claiming that the exclusivity provision of section 15 of the Workers' Compensation Act barred Le's action. Section 15 states in pertinent part that " an employer's liability for payment of workers' compensation provided for in this statute shall be the exclusive remedy." *Id.* at 1069. Federated additionally argued that although section 44 of the Maryland Workers' Compensation Act provides an exception to the exclusivity rule by permitting common law actions against employers for deliberate torts, it did not apply to Le. *Id.* Federated cited Maryland case law for the proposition that an employee could sue only if the potential tort-feasor was the employer's " alter ego" or acted with its express authorization. *Id.* at 1070 (citing *Continental Casualty Co. v. Mirabile*, 449 A.2d 1176 (Md. Ct. Spec. App. 1982)). Federated argued that because Spahr was not its " alter ego," nor acting with its express authority, Le's only redress was governed by the terms of the Act. Accepting this interpretation, the circuit court granted Federated's motion.

The court of special appeals reversed, stating that because Le's case involved non-physical injuries, it did not fall within the provision of the Workers Compensation Act. *Id.* The intermediate appellate court distinguished Le's case from earlier cases on the ground that the latter dealt with physical injuries while Le's injuries were non-physical, thereby allowing Le's action to proceed. *Id.* Federated appealed to the court of appeals which affirmed the intermediate court's decision on different grounds.

The court of appeals began its analysis by interpreting the appropriate sections of the Workers' Compensation Act. *Id.* at 1071. The court first reiterated the basic principal that section 44 operates as an exception to the exclusivity requirement of section 15 and provides that an employee shall have the " option to take benefits under article or sue where injury or death results from the deliberate intention of employer." *Id.* (quoting Md. Ann. Code art. 101 § 44 (1985 & 1990 Supp.)). The court held that the prior decisions of the court of special appeals construed the section too narrowly by requiring that the tort-feasor be the employer's " alter ego" or act with its express authority. *Id.* at 1072.

The court of appeals declined to adopt the " alter ego" test and allowed Le to bring the common law suit. *Id.* In support of its broad application of section 44, the court cited decisions which support an employee's right to sue his employer for " some intentional torts based on the employer's vicarious liability for the conduct of a co-employee." *Id.* at 1073-74. The court, however, declined to define the parameters of the section 44 exception. *Id.*

The court in *Federated Department Stores v. Le* has significantly broadened the interpretation of section 44 causes of action and the exclusivity exception in the Maryland Workers' Compensation Act. In so doing, the court aligned Maryland with the majority of other jurisdictions which have similar exclusivity provisions and exceptions in their respective Workers' Compensation Acts. Maryland employers are now subject to increased liability for injuries to their employees. Potential plaintiffs may now seek a common law action against their employers for the deliberate actions of co-employees causing non-physical injury. In this respect, more employers may have to defend themselves against claims arising from situations over which they have little control. Moreover, the small business owner who, although able to exert some control over the situation, may not have the financial means to afford the increased litigation costs of actions now permitted.

- Steven B. Drucker

Alexander & Alexander v. Evander & Assoc., Inc.: COURT OF SPECIAL APPEALS VACATES STATE'S LARGEST PUNITIVE AWARD.

Acting in accordance with a recent United States Supreme Court opinion, the Court of Special Appeals of Maryland recognized in *Alexander & Alexander v. Evander & Assoc., Inc.*, 596 A.2d 687 (Md. Ct. Spec. App. 1991), an opportunity to review Maryland's system of awarding punitive damages. In holding that the award in *Alexander* violated due process, the court vacated the award and remanded for retrial the issues of whether, and in what amount, punitive damages should have been rendered.

B. Dixon Evander & Associates, Inc. (" Evander"), an insurance broker, secured medical malpractice insurance for doctors at the University of Maryland Hospital with an insurer, Mutual Fire, whose underwriter was Shand, Morahan and Co. (" Shand"). Shand was a subsidiary of another broker, Alexander & Alexander (" A & A"). Evander and Shand had a contract whereby Evander was to be Shand's exclusive representative for professional malpractice coverage.

In order to obtain less expensive malpractice coverage, the hospital secured A & A as its new exclusive broker in 1985. This decision created a conflict with Shand's agreement to underwrite exclusively for A & A. Aware of the conflict, Shand officials refused to place any of the hospital's insurance needs with its carrier except through Evander. At trial, it was revealed that A & A officials had pressured Shand officials to accept hospital policies through A & A in spite of Shand's promise to Evander.

Evander claimed that A & A had tortiously interfered with his contract with Shand, thereby depriving him of commissions from that contract. Evander additionally alleged that A & A had conspired to harm his business reputation. Testimony at trial revealed that an A & A vice-president

had a personal dislike for Evander and that the official held a grudge against Evander and had vowed to put him out of business. The jury awarded $250,052 in compensatory damages to Evander against all defendants as well as $40 million in punitive damages against A & A. Although Evander was also awarded $70,104 in punitive damages against Shand, he dismissed that claim. On A & A's motion, Baltimore City Circuit Judge Meyer Cardin reduced the punitive damages against A & A to $12.5 million, added to the compensatory damages, and left the rest of the verdict intact.

A & A's appeal to the Court of Special Appeals of Maryland centered around the punitive damages award. Specifically, A & A complained that the award violated both federal and state requirements for due process of law, based on the amount of the award and the lack of relation to " proper standards." A & A premised its argument on the Supreme Court's recent decision in *Pacific Mut. Life Ins. v. Haslip*, 111 S. Ct. 1032 (1991).

In *Haslip*, the justices turned back a broad-based challenge to punitive damages, pointing out that they have " long been a part of traditional state tort law." *Alexander*, 596 A.2d at 705 (quoting *Silkwood v. Kerr McGee*, 464 U.S. 238 (1984)). The Court, however, did note that punitive damage awards are subject to due process considerations and warned that states must provide sufficient standards to guide juries and judges in their decisions on when punitive damages should be awarded. These standards, the Court opined, must include proper jury instruction and sufficient judicial review of the award. *Alexander*, 596 A.2d at 705-06 (citing *Haslip*, 111 S. Ct. at 1044 (1991)). The court took this opportunity to determine whether Maryland law on punitive damages complied with the implicit standards from *Haslip*: guidance for the jury's and the court's discretion and judicial review of jury verdicts.

Because Maryland's highest court had never promulgated a list of standards for punitive damages, the court turned to Maryland case law to determine whether Maryland courts had ever articulated the principles of punitive damages. The court concluded that the principles expressed in Maryland decisions were sufficient to guide juries and judges. The court first noted the court of appeals holding that punitive damages " are to punish the wrongdoer, to teach him not to repeat his wrongful conduct and to deter others from engaging in the same conduct," *Alexander*, 596 A.2d at 708 (citing *Wedeman v. City Chevrolet Co.*, 366 A.2d 7, 12 (1976)). With regard to when a court is to impose such damages, the court noted another court of appeals decision in which punitive damages would be imposed only where there is " outrageous conduct." *Id.* at 708 (citing *Nast v. Lockett*, 539 A.2d 1113, 1116 (1988)).

As to judicial review of punitive damages, the court found that the circuit courts in Maryland have broad discretion to review jury verdicts for excessiveness. The court acknowledged, however, that " [a]s a general rule in Maryland, 'the question of whether a verdict is excessive is not open on appeal,'" *Id.* at 709 (citing *Continental Gas Co. v. Mirabile*, 449 A.2d 1176, 1184 (1982)), and that the Maryland appellate courts have never tampered with the amount of an award.

After reviewing Maryland procedures for punitive damage awards and deeming them sufficient, the court recognized that *Haslip* required courts to look further. The court stated the following:

> [i]f faced with a punitive award that was entered upon proper procedure but which nonetheless contravenes due process because it is all out of proportion to both the harm caused and the perniciousness of the conduct, we could not, on the ground of judicial impotence, allow the unconstitutional award to stand.

Id. at 710. Armed with the additional power of review extended by *Haslip*, the court analyzed the award against A & A. The court was troubled by the fact that Evander had not presented evidence of A & A's net wealth and ability to pay, and that the jury had not been advised of the punishment and deterrent purposes of punitive damages.

Several other factors influenced the court's holding that the $12.5 million punitive award against A & A violated due process. The court first pointed out that the award against A & A was the largest ever rendered by a Maryland court. The nearest in amount was $7.5 million awarded in *Potomac Electric v. Smith*, 558 A.2d 768 (1989). In addition, the court believed the award to be far in excess of the actual harm caused to Evander. The court noted that the award was nearly fifty times the essentially liquidated compensatory damages and observed that until the very end of the case, Evander himself had not sought more than $5 million.

Finally, the court decided that A & A's conduct, while " opprobrious, . . . excessive, ill-motivated, and . . . stupid," did not rate " high on the scale of reprehensibility." *Alexander*, 596 A.2d at 711. The court arrived at this conclusion after comparing A & A's case with *Potomac Electric*, where an electric utility had allowed a high voltage wire to remain downed in an area frequented by children, resulting in the electrocution of a child. The court in that case found that the utility company's wanton conduct justified a $7.5 million punitive award. Observing that A & A had neither endangered public health or safety nor engaged in life-threatening activity, the court held that the award did not comport with due process. *Alexander*, 596 A.2d at 711.

Following tradition, the court chose not to alter the award. While the court recognized that " the occasion may arise where an appellate reduction may be the most appropriate solu-

tion," it declined to find that situation in *Alexander*. *Id.* at 711. The court instead vacated the punitive award and remanded for retrial the questions of whether, and in what amount, A & A's conduct justified a punitive damages award. The court also suggested specific instructions for the jury on remand.

The *Alexander* opinion provides fresh insight on how the Maryland state courts should determine punitive damages. Though the court determined that the standards set by case law were sufficient, it also acknowledged that Maryland courts in the past may have limited themselves too much in reviewing punitive damage awards. With the *Haslip* decision in mind, the court in *Alexander* gave appellate courts a green light for considering due process when examining punitive damage awards.

The *Alexander* case also serves to remind attorneys and judges of the importance of jury instructions for punitive damage awards. Juries must be told that punitive damages serve to punish wrongdoers and deter others from similar conduct. Juries need to be aware of the standards for actual malice and other factors, such as the wrongdoer's net worth and ability to pay in order to make an informed decision.

- Catherine E. Head

***B & K Rentals and Sales Co. v. Universal Leaf Tobacco Co.*: MARYLAND ABANDONS SPEAKING AUTHORITY REQUIREMENT AND " RES GESTAE" APPROACH AND BINDS PRINCIPAL BY AGENT'S STATEMENTS PURSUANT TO F.R.E. 801(d)(2)(D).**

In *B & K Rentals and Sales Co. v. Universal Leaf Tobacco Co.*, 596 A.2d 640 (Md. 1991), the Court of Appeals of Maryland held that a statement of a party opponent's agent, which concerns a matter within the scope of agency or employment and is made during the existence of that relationship, may constitute an admission by the party opponent. By so ruling, the court of appeals adopted the principle embodied in Federal Rule of Evidence 801(d)(2)(D) and abandoned the traditional common law approach which required " speaking authority" before the statement was considered an admission of the principal.

B & K Rentals and Sales Co. ("B & K") stored equipment used in its business of renting scaffolding and seating for public gatherings in a portion of a warehouse owned by Universal Leaf Tobacco Co. ("Universal"). B & K brought an action for damages against Universal, contending that the negligence of Universal and its employees caused a fire which resulted in a substantial amount of damage to B & K's equipment. Only two Universal employees were present and working at the warehouse on the day of the fire, one of whom died in the fire. B & K never deposed or subpoenaed the surviving employee, Leonard Grimes. The parties disputed both the availability of the surviving employee as a witness and B & K's efforts to locate him at the time of the trial.

The case turned on the testimony of an expert witness, Lieutenant Kenneth J. Klasmeier, a fire investigator with the Anne Arundel County Fire Department. Lt. Klasmeier based his testimony on a written report he received from another Anne Arundel Fire Department Investigator, Lieutenant James Stallings. Lt. Stallings based his report, regarding his investigations of the origin and cause of the fire, primarily on Grimes' statements at the scene of the fire. Grimes told Lt. Stallings that:

> 1) Johnson and he were the only two people working at the warehouse at the time of the fire;
> 2) Grimes had lit an acetylene torch for Johnson a couple of hours before the fire;
> 3) Johnson was using the torch to burn strings caught in the jack wheels of a wooden dolly;
> 4) Grimes heard a popping noise and saw smoke coming from the area where Johnson had just finished burning the string from the jack wheels; and
> 5) Grimes believed the cause of the fire was related to Johnson's use of the acetylene torch."

Id. at 641.

The trial court excluded both Stallings' and Klasmeier's reports. The court ruled that the reports were inadmissible because each relied on Grimes' hearsay statements, and neither qualified as admissions of a party opponent or as part of the *res gestae* exception. *Id.* at 642. The court of special appeals affirmed. The Court of Appeals of Maryland granted certiorari to consider the laws under which evidence of admissions of party opponents were admissible.

The court began its analysis by re-examining the development of Maryland's case law on vicarious admissions. The court noted that Maryland courts traditionally implemented an evidentiary standard based on agency law. Under this traditional test, the court required an agent to have " speaking authority" before his statements qualified as an admission of the principal. *Id.* at 643 (citing *Brown v. Hebb*, 175 A. 602, 607 (Md. 1934)).

The court recognized the problems inherent in the application of the traditional test of agency law as an evidentiary standard. The court pointed out that the narrow formula of admissibility under the traditional test was problematic because it " frequently caused courts to exclude the agent's highly probative statement on the theory that the employer had not authorized the agent to make damaging remarks about him." *Id.* at 643. (quoting 4 J. Weinstein & M. Berger, *Weinstein's Evidence*, § 801(d)(2)(D)[01] at 219 (1988)).

The court next considered Maryland's expansion of the traditionally narrow formula of admissibility through the adoption of the *res gestae* exception to the hearsay rule.