STATE OF MARYLAND COMPENDIUM OF LAW

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PRE-SUIT AND INITIAL CONSIDERATIONS

Pre-Suit Notice Requirements/Prerequisites to Suit

A) **Local government.** The Local Government Tort Claims Act (LGTCA) provides that an action for unliquidated damages may not be brought against a local government or its employees unless the notice of the claim required by this section is given within 180 days after the injury. *See* MD. CODE ANN., CTS. & JUD. PROC. § 5-304 (2008).

B) **Tort claims act.** Under the Maryland Tort Claims Act, a claimant may not initiate an action against the government unless: (1) the claimant submits a written claim to the Treasurer or a designee of the Treasurer within 1 year after the injury to person or property that is the basis of the claim; (2) the Treasurer or designee denies the claim finally; and (3) the action is filed within 3 years after the cause of action arises. *See* MD. CODE ANN., STATE GOV'T § 12-106 (2008).

Relationship to the Federal Rules of Civil Procedure

Maryland has its own Code of Civil Procedure. MD. RULE 2-101 *et seq.* (2008); MD. RULE 3-101 *et seq*. (2008). It has adopted certain portions of certain Federal rules.

Description of the Organization of the State Court System

A) Structure.

1) **District court.** In the Maryland District Court system, 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 (2008). 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 (by law), 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) (2008). In district court cases where more than $10,000.00 is demanded in the Complaint, either party may pray a jury trial thereby promoting the action to the Circuit Court. *Id.*

   District court is specifically designed to be a streamlined, cost-effective forum to efficiently dispose of smaller claims, with no need for expert 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. CODE ANN., CTS. & JUD. PROC. § 3-701 (2008). For all non-small claims cases (District Court), discovery is generally limited to fifteen (15) interrogatories. No depositions are permitted without order of court, and such orders are extremely rare. In addition, live experts generally do not testify, but a party can introduce copies of medical and other reports by simply giving notice to the court within sixty (60) days of 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 circuit courts 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 $10,000.00, 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) (2008). 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 (2008). A unanimous decision is required.

Full discovery is allowed in circuit court, including thirty (30) interrogatories per party, and generally unlimited 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 experts witnesses and independent medical examinations. For more information on Maryland's Circuit Courts please log onto www.courts.state.md.us/circuit.html.

3) **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 MD. RULE 8-206(a) (2008), 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. *See* MD. CODE ANN., CTS. &

JUD. PROC. § 1-401 *et seq.* (2008). For more information on the Court of Special Appeals please log on to www.courts.state.md.us/cosalist.html.

4) **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 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. *See* MD. CONST. art. IV § 14; MD. CODE ANN., CTS. & JUD. PROC. § 1-301 *et seq.* (2008). For more information on the Court of Appeals please log on to www.courts.state.md.us/coappeals/index.html.

Service of Summons

A) Service of Summons in the Circuit Court of Maryland is governed by MD. RULE 2-124 (2008): Process – Persons to be Served. The Rule provides in pertinent part:

> **(b) Individual.** Service is made upon an individual by serving the individual or an agent authorized by appointment or by law to receive service of process for the individual.
>
> **(c) Individual Under Disability.** Service is made upon an individual under disability by serving the individual and, in addition, by serving the parent, guardian, or other person having care or custody of the person or estate of the individual under disability.
>
> **(d) Corporation.** Service is made upon a corporation, incorporated association, or joint stock company by serving its resident agent, president, secretary, or treasurer. If the corporation, incorporated association, or joint stock company has no resident agent or if a good faith attempt to serve the resident agent, president, secretary, or treasurer has failed, service may be made by serving the manager, any director, vice president, assistant secretary, assistant treasurer, or other person expressly or impliedly authorized to receive service of process.
>
> **(e) General Partnership.** Service made upon a general partnership sued in its group name in an action pursuant to Code, Courts Article, § 6-406 by serving any general partner.
>
> **(f) Limited Partnership.** Service is made upon a limited partnership by serving its resident agent. If the limited partnership has no resident agent or if a good faith attempt to

serve the resident agent has failed, service may be made upon any general partner or other person expressly or impliedly authorized to receive service of process.

(g) Limited Liability Partnership. Service is made upon a limited liability partnership by serving its resident agent. If the limited liability partnership has no resident agent or if a good faith attempt to serve the resident agent has failed, service may be made upon any other person expressly or impliedly authorized to receive service of process.

(h) Limited Liability Company. Service is made upon a limited liability company by serving its resident agent. If the limited liability company has no resident agent or if a good faith attempt to serve the resident agent has failed, service may be made upon any member or other person expressly or impliedly authorized to receive service of process.

(i) Unincorporated Association. Service is made upon an unincorporated association sued in its group name pursuant to Code, Courts Article, § 6-406 by serving any officer or member of its governing board. If there are no officers or if the association has no governing board, service may be made upon any member of the association.

(j) State of Maryland. Service is made upon the State of Maryland by serving the Attorney General or an individual designated by the Attorney General in a writing filed with the Clerk of the Court of Appeals. In any action attacking the validity of an order of an officer or agency of this State not made a party, the officer or agency shall also be served.

(k) Officer or Agency of the State of Maryland. Service is made on an officer or agency of the State of Maryland by serving (1) the resident agent designated by the officer or agency, or (2) the Attorney General or an individual designated by the Attorney General in a writing filed with the Clerk of the Court of Appeals. If service is made on the Attorney General or a designee of the Attorney General and the officer or agency is not ordinarily represented by the Attorney General, the Attorney General or designee promptly shall forward the process and papers to the appropriate officer or agency.

(l) Local Entity. Service is made on a county, municipal corporation, bicounty or multicounty agency, public authority, special taxing district, or other political subdivision or unit of a political subdivision of the State by serving the resident agent designated by the local entity. If the local entity has no resident agent or if a good faith effort to serve the resident agent has failed, service may be made by serving the chief executive or presiding officer or, if none, by serving any member of the governing body.

(m) United States. Service is made upon the United States by serving the United States Attorney for the District of Maryland or an individual designated by the United States Attorney in a writing filed with the clerk of the court and by serving the Attorney General of the United States at Washington, District of Columbia. In any action attacking the validity of an order of an officer or agency of the United States not made a party, the officer or agency shall also be served.

(n) Officer or Agency of the United States. Service is made upon an officer or agency of the United States, including a government corporation, by serving the United States and by serving the officer or agency.

(o) Substituted Service upon State Department of Assessments and Taxation. Service may be made upon a corporation, limited partnership, limited liability partnership, limited liability company, or other entity required by statute of this State to have a resident agent by serving two copies of the summons, complaint, and all other papers filed with it, together with the requisite fee, upon the State Department of Assessments and Taxation if (i) the entity has no resident agent; (ii) the resident agent is dead or is no longer at the

address for service of process maintained with the State Department of Assessments and Taxation; or (iii) two good faith attempts on separate days to serve the resident agent have failed. MD. RULE *2-124*.

See MD. RULE 3-124 (2008) for the rules of service in the District Court of Maryland.

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 statutory agent for a defendant. In such a case, the notice shall be filed within sixty (60) days after service. *See* MD. RULE 3-307(b) (2008). A party may, without filing a Notice of Intention to Defend, appear and 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 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* MD. RULE 3-306(b)(2) (2008).

2) Circuit Court: Pursuant to MD. RULE 2-321 (2008), an Answer must be filed to a complaint, counterclaim, cross-claim, or third-party claim, within 30 days after service except that:

1. 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.

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

3. 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.

4. 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.

5. 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.

Statutes of Limitations

A) **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 (2008). Maryland

law requires that the statute of limitations defense be specifically pled or it is deemed waived.

B) **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).

C) **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 (2008); *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).

D) **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 (2008). 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).

E) **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 (2008).

F) **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 (2008). This section is not applicable to workers' compensation claims.

G) **Contractual limitations.** 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).

1) **Warranty.** In Maryland there is a general two-year statute of limitations on breach of warranty claims against a seller in sales contracts involving new construction. *See* MD. CODE ANN., REAL PROP., § 10-204 (2008). The statute of limitations begins running when the injury and its general cause are discovered or

should have been discovered or within two years of the expiration of the warranty, whichever occurs first. *Lumsden v. Design Tech Builders, Inc.*, 749 A.2d 796, 804 (2000).

2) **Transactions in goods.** Under Maryland's adaptation of the Uniform Commercial Code (UCC) there is a general four year statute of limitations for warranty breach of contract claims in contracts for transactions in goods. MD. CODE ANN., COM. LAW § 2-725 (2008) states:

> (1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.
>
> (2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

H) Miscellaneous provisions:

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

2) **Governments.** 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).

3) **Asbestos.** Special provisions apply to asbestos cases. *See* MD. CODE ANN., CTS. & JUD. PROC. § 5-108 (2008).

Statute of Repose

Maryland has a Statute of Repose found in the MD. CODE ANN., CTS. & JUD. PROC., § 5-108 (2008). The relevant language of § 5-108 provides:

> (a) . . . [E]xcept as provided by this section, no cause of action for damages accrues and a person may not seek contribution or indemnity for damages incurred when wrongful death, personal injury, or injury to real or personal property resulting from the defective and unsafe condition of an improvement to real property occurs more than 20 years after the date the entire improvement first becomes available for its intended use.

> (b) . . . [E]xcept as provided by this section, a cause of action for damages does not accrue and a person may not seek contribution or indemnity from any architect, professional engineer, or contractor for damages incurred when wrongful death, personal injury, or injury to real or personal property, resulting from the defective and unsafe condition of an improvement to real property, occurs more than 10 years after the date the entire improvement first became available for its intended use.
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> * * *
>
> Upon accrual of a cause of action referred to in subsections (a) and (b) of this section, an action shall be filed within 3 years.

A) **Purpose.** The purpose of § 5-108 was to protect builders, contractors, realtors, and landlords from suits for latent defects in design, construction, or maintenance of an improvement to real property that are brought more than twenty years after the improvement is first put to use. *Carven v. Hickman*, 135 Md. App. 645, 651, 763 A.2d 1207 (2000).

B) **Applicability.** The Maryland statute of repose for actions resulting from improvement to real property applies to both contractors and subcontractors. *Hartford Ins. Co. of Midwest v. American Automatic Sprinkler Systems, Inc.*, 1998, 23 F.Supp.2d 623, 629 (D.Md. 1998). However, a purely financial injury does not fall within the purview of the Maryland statute of repose. *Carven v. Hickman*, 135 Md. App. 645, 660, 763 A.2d 1207 (2000).

Venue Rules

MD. CODE ANN., CTS. & JUD. PROC., § 6-201 (2008):

> [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. In addition, 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.

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; and (2) tort actions based on negligence - where the cause of action arose. *See* MD. CODE ANN., CTS. & JUD. PROC., § 6-202 (2008).

NEGLIGENCE

Comparative Fault/Contributory 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. As a contributory negligence state, it does not follow the rule of comparative fault. 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).

Exclusive Remedy – Worker's Compensation Protections

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 (2008). 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. 494, 496-497, 444 A.2d 1045 (1982).

A) Key Worker's Compensation facts:

1) **Appeal.** Any party dissatisfied with the Award may file an appeal to the Circuit Court. An appeal will allow for a new trial on all issues but the Commission's decision is presumed to be correct and the appealing party has the burden to show the decision was incorrect MD. CODE ANN., LAB. & EMPL.. § 9-737 (2008). An appeal is not a stay of an order; compensation ordered to the claimant must be paid regardless of appeal. MD. CODE ANN., LAB. & EMPL.. § 9-741 (2008). If the employer/insurer prevail on appeal, they are not entitled to reimbursement for benefits previously paid.

2) **Compensation prohibited.** Claimant is not entitled to benefits if the accidental injury or occupational disease or hernia is self-inflicted, solely caused by the effect of taking drugs or intoxication, or willful misconduct. MD. CODE ANN., LAB. & EMPL.. § 9-506 (2008).

3) **Exclusivity.** Employee may not sue employer for work-related injury, unless injury results from an intentional act of an "alter-ego" of the employer, or where employer fails to secure WC insurance. Employee may, however, sue individual co-employees.

4) **Intentional acts by third parties.** It is only necessary for the employee to show that the incident arose "in the course of" the employment, even if the incident had no relationship to (i.e. did not "arise out of") the employment.

B) Some Permissible Worker's Compensation claims (this list is not exclusive):

1) **Accidental injury (AI).** Benefits are to be paid for accidental personal injuries arising out of and in the course of employment. MD. CODE ANN., LAB. & EMPL.. § 9-501 (2008). If an AI aggravates an underlying condition, all resulting lost time and treatment is compensable, though apportionment may be claimed for permanency.

2) **Occupational disease (OD).** Claims involving some ailment, disorder, or illness which is the expected result of working under conditions naturally inherent in the employment and inseparable therefrom and which is ordinarily slow and insidious in approach and from which the claimant has a "disablement" (i.e. the claimant has become partially or totally disabled). MD. CODE ANN., LAB. & EMPL.. § 9-502 (2008).

3) **Hernias.** A hernia that is caused by an accident or strain arising out of and in the course of employment is generally compensable if the hernia did not exist before the accidental injury or strain occurred. MD. CODE ANN., LAB. & EMPL. § 9-504 (2008).

C) **Liens.** The worker's 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).

Indemnification

A) **Express indemnity.** When there is an express indemnity clause in a contract, it cannot be read as indemnifying someone against his sole negligence. *Heat & Power Corp v. Air Products & Chemicals, Inc.*, 320 Md. 584, 578 A.2d 1202 (1990). This would be void against both Maryland public policy and against MD. CODE ANN., CTS. & JUD. PROC. § 5-305 (2008).

However, if a contract provision or sentence can properly be construed as reflecting two agreements, one providing for indemnity if the promisee is solely negligent and one providing for indemnity if the promisee and promisor are concurrently negligent, only the former agreement is voided by the statute. *Id*.

B. **Implied Indemnity.** *Board of Trustees of Baltimore County Community Colleges v. RTKL Associates, Inc.*, 80 Md. App. 45, 559 A.2d 805 (1989):

> When an indemnity provision is not expressly found in a contract, there may be a right to implied indemnity . . . . Indemnity requires that, where one of the wrongdoers is primarily

> liable, that wrongdoer must bear the whole loss . . . . Indemnity implies a shifting of the entire loss from the party who paid the judgment to the tortfeasor who should in fairness bear it.

Max's Of Camden Yards v. A.C. Beverage, 172 Md. App. 139, 913 A.2d 654 (2006):

> Frequently occurring situations in which a right to implied indemnity between tortfeasors has been recognized include when a tortfeasor is liable: (1) vicariously for the conduct of another, (2) for failing to discover a defect in a chattel supplied by another, (3) for failing to discover a defect in work performed by another, and (4) for failing to discover a dangerous condition on land created by another.

1) **Applicability.** Maryland relies on a passive/active negligence analysis to determine if there is a right to implied indemnity. "Under this analysis, a party is only entitled to indemnification when the party's actions, although negligent, are considered to be passive or secondary to those of the primary tortfeasor." *Board of Trustees of Baltimore County Community Colleges v. RTKL Associates, Inc.*, 80 Md. App. 45, 559 A.2d 805, 810 (1989). "However, it is well established under Maryland law that someone who is guilty of active negligence cannot obtain tort indemnification, regardless of whether the alleged tortfeasor from whom indemnity is being sought was also actively negligent." *Franklin v. Morrison*, 350 Md. 144, 711 A.2d 177 (1998).

C. **Comparative indemnity.** Although some jurisdictions may adopt comparative indemnity schemes based upon comparative negligence concepts, Maryland is a contributory negligence state. As such, it does not have the rule of comparative indemnity.

Strict Liability

Maryland has adopted the strict liability theory in RESTATEMENT (SECOND) OF TORTS § 402A. *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. *Lloyd v. General Motors Corp.*, 397 Md. 108, 916 A.2d 257, 272 (2007) states,

> To recover for injury under strict liability, a plaintiff must establish that: (1) the product was in a defective condition at the time that it left the possession or control of the seller; (2) that it was unreasonably dangerous to the user or consumer; (3) that the defect was a cause of the injuries, and (4) that the product was expected to and did reach the consumer without substantial change in its condition.

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 (2008). 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.

MD. CODE ANN., CTS. & JUD. PROC. § 5-405 (2008).

Willful and Wanton Conduct

Maryland law defines "willful or wanton" conduct as that which is "extraordinary and outrageous," *Earle v. Gunnell*, 78 Md. App. 648, 664, 554 A.2d 1256 (1989); *Smith v. Gray Concrete Pipe Co.,* 267 Md. 149, 165-6, 297 A.2d 721 (1972); *Medina v. Meilhammer,* 62 Md. App. 239, 248-251, 489 A.2d 35 (1985) (quoting Prosser and Keeton, *Law of Torts*), *cert. denied,* 303 Md. 683, 496 A.2d 683 (1985). A person is said to exhibit willful and wanton conduct when the person "has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow; this is usually accompanied by a conscious indifference to the consequences of an action." *Medina v. Meilhammer*, 62 Md. App. 239, 249-250, 489 A.2d 35 (1985).

DISCOVERY

Electronic Discovery Rules

A) **Process.** In Maryland a party is free to obtain electronically stored information through the same discovery process used to obtain other documents and tangible things. Provided the electronically stored information is not privileged and is relevant to the subject matter of the action, it is subject to the same process of discovery. The requesting party may specify the form in which electronic discovery is provided however. *See* MD. RULE 2-402(a) (2008). If no request is made, electronic discovery is to be provided in the form in

which it is usually kept in the normal course of business. *See* MD. RULE 2-422(d)(1) (2008).

B) **Not reasonably accessible exception.** An exception exists for electronically stored information that is not reasonably accessible. If undue burden or cost would result from the production of any electronically stored information, a party may refuse to provide it. This party must then identify the sources whose production would result in undue burden or cost and explain why. This statement must also provide the requesting party with enough information to evaluate the costs of production and the likelihood of gaining useful information from these sources. On a motion to compel discovery, the requesting party must show that its need for the discovery outweighs the burden and costs associated with its production, and should the court compel the discovery, it may specify conditions, such as an assessment of costs. *See* MD. RULE 2-402(b)(2) (2008).

C) **Sanctions.** A court may not impose sanctions for failure to respond to a discovery request for electronically stored information that is no longer available due to the normal good-faith routine of an electronic information system. *See* MD. RULE 2-433(b) (2008). This limitation is only to the imposition of sanctions under this rule however. The court may still impose sanctions for a failure to preserve evidence. *Weaver v. ZeniMax Media, Inc.* 175 Md. App. 16, 923 A. 2d 1032, *cert. denied*, 401 Md. 174, 931 A.2d 1097 (2007).

Expert Witnesses

The law differentiates between opinion testimony of lay witnesses, offered pursuant to MD. RULE 5-701 (2008), and expert testimony offered pursuant to MD. RULE 5-702 (2008).

A) **Lay testimony.** MD. RULE 5-701:

> When a lay person is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

B) **Expert testimony.** When a person is testifying as an expert, the court must determine whether they are qualified to offer evidence. Pursuant to MD. RULE 5-702, the court shall determine "(1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony." In interpreting this rule, Maryland state courts differ from the federal courts, as the Supreme Court cases of *Daubert* and *Kuhmo Tire* have not been adopted in Maryland. However, the Maryland case of *Giant Food, Inc. v. Booker*, 152 Md. App. 166, 183 (2003), has imposed the requirement that expert testimony be the product of reliable principles and methods.

A) **Forms of disclosure - reports required.** MD. RULE 2-402(g) (2008) - Trial Preparation-Experts, provides in pertinent part:

> (1) Expected to Be Called at Trial.
>
> (A) Generally. A party by interrogatories may require any other party to identify each person, other than a party, whom the other party expects to call as an expert witness at trial; to state the subject matter on which the expert is expected to testify; to state the substance of the findings and the opinions to which the expert is expected to testify and a summary of the grounds for each opinion; and to produce any written report made by the expert concerning those findings and opinions. A party also may take the deposition of the expert.
>
> (B) Additional Disclosure With Respect to Experts Retained in Anticipation of Litigation or for Trial. In addition to the discovery permitted under subsection (g)(1)(A) of this Rule, a party by interrogatories may require the other party to summarize the qualifications of a person expected to be called as an expert witness at trial and whose findings and opinions were acquired or obtained in anticipation of litigation or for trial, to produce any available list of publications written by that expert, and to state the terms of the expert's compensation.

B) **Rebuttal witnesses.** The Maryland Rules of Evidence provide: "The credibility of a witness may be attacked by any party, including the party calling the witness." MD. RULE 5-607 (2008). MD. RULE 5-616(b) (2008) allows for impeachment of witnesses by extrinsic evidence, and MD. RULE 5-616(c) allows rehabilitation for a witness whose credibility has been attacked.

C) **Discovery of expert 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 more information on the Work Product Doctrine, see below under Privileges*)

Non-Party Discovery

A) **Subpoenas.** Pursuant to MD. RULE 2-510(a) (2008) a subpoena is required to compel the person to whom it is directed, whether is be a nonparty or a party over whom the court has acquired jurisdiction, to "attend, give testimony, and produce designated documents, electronically stored information, or tangible things at a court proceeding, including proceedings before a master, auditor, or examiner."

MD. RULE 2-510(d) (2008) provides (with emphasis added):

> A subpoena shall be served by delivering a copy to the person named or to an agent authorized by appointment or by law to receive service for the person named or as permitted by Rule 2-121(a)(3). Service of a subpoena upon a party represented by an attorney may be made by service upon the attorney under Rule 1-321(a). A subpoena may be served by a sheriff of any county or by any person who is not a party and who is not less than 18 years of age. Unless impracticable, a party shall make a good faith effort to cause a trial or hearing subpoena to be served *at least five days before the trial or hearing*.

B) **Respondents.** Respondents have the right to object to subpoenas. MD. RULE 2-510(e) allows a person to object to a subpoena to appear for court proceedings, in response to

which, if good cause is shown, the court may enter an order that justice requires to protect the person from annoyance, embarrassment, oppression, or undue burden or cost. MD. RULE 2-510(f) allows a person to object to an order to appear for a subpoena by filing a motion for a protective order pursuant to MD. RULE 2-403 (2008).

Privileges

A) **Attorney client.** Attorney-client privilege is "a rule of evidence that prevents the disclosure of a confidential communication made by a client to his attorney for the purpose of obtaining legal advice." *Haley v. State*, 398 Md. 106, 125-126, 919 A.2d 1200 (2007) (quoting *Newman v. State,* 384 Md. 285, 302, 863 A.2d 321 (2004) (citations omitted)). The privilege is codified in the MD. CODE ANN., CTS. & JUD. PROC. § 9-108 (2008), which states "[a] person may not be compelled to testify in violation of the attorney-client privilege."

The elements of attorney-client privilege are as follows: (1) where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his insistence permanently protected (7) from disclosure by himself or by his legal adviser, (8) except the protection may be waived. *Haley v. State*, 398 Md. 106, 125-126, 919 A.2d 1200 (2007); *Newman v. State,* 384 Md. 285, 302, 863 A.2d 321 (quoting *Harrison v. State,* 276 Md. 122, 135, 345 A.2d 830 (1975)); 8 J. Wigmore, EVIDENCE § 2292 at 554 (McNaughton rev. ed.1961).

B) **Statements.** MD. RULE 2-402 (2008) 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).

C) **Work product.** 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).

D) **Self-critical analysis.** There are no Maryland state cases which recognize the self-critical analysis privilege directly. There are however several federal cases interpreting

Maryland statutes in light of this privilege. In *Brem v. DeCarlo, Lyon, Hearn & Pazourek, P.A.*, 162 F.R.D. 94, 101 (D.Md.1995), the court interpreted MD. CODE ANN., HEALTH OCC. § 14-501 (2008) to conclude that the state legislature had intended medical peer-review proceedings to be absolutely confidential under the self-analysis privilege conferred by this statute. The court stated that, by ensuring the confidentiality of peer review proceedings, the Maryland legislature sought to foster effective review of medical care and thereby improve the quality of health care.

The court also went on to discuss the self-critical analysis privilege more generally. Courts that have upheld the self-critical analysis privilege have generally recognized three criteria that must be met in order for it to apply: 1) the information sought must result from an internal review conducted to improve procedures or products; 2) the party conducting the review must have intended that the information remain confidential in order to preserve the free exchange of ideas; and 3) the information must be such that permitting discovery of it would curtail that free exchange. *Brem v. DeCarlo, Lyon, Hearn & Pazourek, P.A.*, 162 F.R.D. 94, 101 (D.Md.1995)

Requests to Admit

A) **Generally.** MD. RULE 2-424 (2008):

> (a) Request for admission. A party may serve one or more written requests to any other party for the admission of (1) the genuineness of any relevant documents or electronically stored information described in or exhibited with the request, or (2) the truth of any relevant matters of fact set forth in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Each matter of which an admission is requested shall be separately set forth.
>
> (b) Response. Each matter of which an admission is requested shall be deemed admitted unless, within 30 days after service of the request or within 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 shall set forth each request for admission and shall specify an objection, or shall admit or deny the matter, or shall set forth in detail the reason why the respondent cannot truthfully admit or deny it. The reasons for any objection shall be stated. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify an answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and deny or qualify the remainder. A respondent may not give lack of information or knowledge as a reason for failure to admit or deny unless the respondent states that after reasonable inquiry the information known or readily obtainable by the respondent is insufficient to enable the respondent to admit or deny. A party who considers that a matter of which an admission is requested presents a genuine issue for trial may not, on that ground alone, object to the request but the party may, subject to the provisions of section (e) of this Rule, deny the matter or set forth reasons for not being able to admit or deny it.
>
> (c) Determination of sufficiency of response. The party who has requested the admission may file a motion challenging the timeliness of the response or the sufficiency of any answer or objection. A motion challenging the sufficiency of an answer or objection shall set forth (1) the request, (2) the answer or objection, and (3) the reasons why the answer

or objection is insufficient. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this Rule, it may order either that the matter is admitted or that an amended answer be served. If the court determines that the response was served late, it may order the response stricken. The court may, in place of these orders, determine that final disposition of the request be made at a pretrial conference or at a designated time prior to trial.

(d) Effect of admission. Any matter admitted under this Rule is conclusively established unless the court on motion permits withdrawal or amendment. The court may permit withdrawal or amendment if the court finds that it would assist the presentation of the merits of the action and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits. Any admission made by a party under this Rule is for the purpose of the pending action only and is not an admission for any other purpose, nor may it be used against that party in any other proceeding.

(e) Expenses of failure to admit. 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.

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

C) **Circuit court.** MD. RULE 2-424 (2008):

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.

EVIDENCE, PROOFS & TRIAL ISSUES

Accident Reconstruction

Before an expert can offer opinion testimony, the testimony must be predicated in fact. *Wallach v. Board of Educ. of Prince George's County*, 99 Md. App. 386, 394, 637 A.2d 859 (1994). Accident reconstruction is an area which requires the use of expert testimony. An expert called to give accident reconstruction testimony must have a sufficient factual foundation for his opinion, and must not give opinions based on mere conjecture or speculation. *See generally* MD. RULE 5-702; *Wallach v. Board of Educ. of Prince George's County*, 99 Md. App. 386, 637 A.2d 859 (1994). *See also section on Expert Testimony.*

Appeal

Parties appealing from the District Court to the Circuit Court must make a timely appeal in accordance with MD. RULE 7-104 (2008). Generally, a notice of appeal must be filed within 30 days after entry of the judgment or order from which appeal is taken. Parties seeking to appeal a ruling of the Circuit Court have the same general 30 day window within which to file notice of appeal. MD. RULE 8-202 (2008) provides, in pertinent part:

> (a) Generally. Except as otherwise provided in this Rule or by law, the notice of appeal shall be filed within 30 days after entry of the judgment or order from which the appeal is taken. In this Rule, "judgment" includes a verdict or decision of a circuit court to which issues have been sent from an Orphans' Court.
>
> (b) Criminal Action--Motion for New Trial. In a criminal action, when a timely motion for a new trial is filed pursuant to Rule 4-331 (a), the notice of appeal shall be filed within 30 days after the later of (1) entry of the judgment or (2) entry of a notice withdrawing the motion or an order denying the motion.
>
> (c) Civil Action--Post-Judgment Motions. In a civil action, when a timely motion is filed pursuant to Rule 2-532, 2-533, or 2-534, the notice of appeal shall be filed within 30 days after entry of (1) a notice withdrawing the motion or (2) an order denying a motion pursuant to Rule 2-533 or disposing of a motion pursuant to Rule 2-532 or 2-534. A notice of appeal filed before the withdrawal or disposition of any of these motions does not deprive the trial court of jurisdiction to dispose of the motion. If a notice of appeal is filed and thereafter a party files a timely motion pursuant to Rule 2-532, 2-533, or 2-534, the notice of appeal shall be treated as filed on the same day as, but after, the entry of a notice withdrawing the motion or an order disposing of it. . . .
>
> (e) Appeals by Other Party--Within Ten Days. If one party files a timely notice of appeal, any other party may file a notice of appeal within ten days after the date on which the first notice of appeal was filed or within any longer time otherwise allowed by this Rule.

Biomechanical Testimony

Biomechanical testimony is another area that requires qualified experts. *See section on Expert Testimony.*

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).

Convictions

A) **Criminal.** Ordinarily, "a criminal conviction is inadmissible to establish the truth of the facts upon which it is rendered in a civil action for damages arising from the offense for which the person is convicted." *State Farm Fire & Cas. Co. v. Carter*, 154 Md. App. 400, 409, 840 A.2d 161 (2003) (quoting *Aetna Casualty & Surety Co. v. Kuhl,* 296 Md. 446, 450, 463 A.2d 822 (1983)). There are however exceptions to this rule when the criminal conviction is not being offered to prove the truth of the underlying assertion. Also, an acquittal is admissible in a subsequent civil case when it is an element of the claim. *Id*.

B) **Traffic.** 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 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).

Day in the Life Videos

Videotapes are generally admissible in evidence on the same basis as motion picture films and are subject to the same general rules applicable to photographic evidence. *Washington v. State*, 179 Md. App. 32, 44-45, 943 A.2d 704 (2008); *Dep't of Pub. Safety & Corr. Servs. v. Cole,* 342 Md. 12, 20, 672 A.2d 1115 (1996). (*See Use of Photographs section below*)

Additionally,

> [a] trial judge's viewing of a video prepared by the plaintiffs showing a "day in the life" of the disabled plaintiff in lieu of actually observing the plaintiff in person has been held to allow sufficient fact-finding by the trial judge in order to decide whether the plaintiff's presence at the liability phase of the trial would be prejudicial.

Green v. North Arundel Hosp. Ass'n, Inc., 126 Md. App. 394, 420, 730 A.2d 221 n.15 (1999) (discussing *Reems v. St. Joseph's Hosp. & Health Ctr.*, 536 N.W.2d 666, 670 (N.D. 1995).

Dead Man's Statute

The Dead Man's Statute is found in MD. CODE ANN., CTS. & JUD. PROC. § 9-116 (2008), which provides:

> A party to a proceeding by or against a personal representative, heir, devisee, distributee, or legatee as such, in which a judgment or decree may be rendered for or against them, or by or against an incompetent person, may not testify concerning any transaction with or statement made by the dead or incompetent person, personally or through an agent since dead, unless called to testify by the opposite party, or unless the testimony of the dead or incompetent person has been given already in evidence in the same proceeding concerning the same transaction or statement.

The Dead Man's Statute "protects the decedent's estate by prohibiting the surviving adverse party from testifying at trial (with respect to facts that could only be contradicted, or corroborated, by the deceased), but that statute does not 'seal the lips' of a non-party witness." *Rhea v. Burt*, 161 Md. App. 451, 458, 870 A.2d 1222 (2005); *see also Clark v. Strasburg,* 79 Md. App. 406, 412, 556 A.2d 1167 (1989), *rev'd on other grounds, Strasburg v. Clark,* 319 Md. 583, 573 A.2d 1339 (1990). Nor does that statute restrict any surviving party's right to conduct appropriate pretrial discovery. *Rhea*, 161 Md. App. 451.

Medical Bills

Generally a plaintiff's medical bills are admissible as damages evidence, regardless if the bills were paid partially or in full by an insurance company. *See also section on Collateral Source Rule*.

Offers 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.

Offers of Proof

The Maryland Court of Appeals has provided a succinct definition of offers of proof:

> It is elementary that a proffer is an offer of proof, which, if accepted, obviates the need for the proponent to offer testimony or other evidence on the issue to which the proffer relates. A stipulation, on the other hand, includes an agreement between opposing counsel concerning what should constitute the evidence at trial. Clearly, an offer of proof, when accepted, becomes a stipulation.

Tu v. State, 336 Md. 406, 431, 648 A.2d 993 (1994).

Additionally, "[t]he Maryland Rules of Evidence provide that error may not be predicated upon a ruling that admits or excludes evidence unless a party either timely objects to the ruling or makes a timely offer of proof." *Southern Management Corp. v. Taha*, 378 Md. 461, 499-500, 836 A.2d 627 (2003). *See also* MD. RULE 5-103 (2008).

Relationship to the Federal Rules of Evidence

Maryland has its own Rules of Evidence. *See* MD. RULE S 5-101 *et seq.* (2008). It has adopted certain portions of certain federal rules.

Seat Belt and Helmet Use Admissibility

Maryland does not provide by statute or case law a defense for injuries where a seat belt was not used. Further, Maryland expressly prohibits an individual's failure to use a seat belt from being considered evidence of negligence, contributory negligence, or to limit liability of an insurer. *See* MD. CODE ANN., TRANSP., § 22-412.3(h) (2008).

Spoliation

Maryland case law does not recognize spoliation of evidence as an independent cause of action. *See Goin v. Shoppers Food Warehouse*, 166 Md. App. 611 (2006). The Court of Special Appeals has held, when discussing both negligent and intentional spoliation of evidence, that: "We are persuaded that the better reasoned cases correctly confine both categories of spoliation to the law of evidence." *Id. at* 618.

In *Goin*, the Court of Special Appeals approvingly cited the California Supreme Court which had held that spoliation did not constitute a separate cause of action. The Court reasoned:

> Obviously, the preservation of items which might be relevant evidence in litigation is desirable. Nevertheless, the foundation of an inquiry into whether to create a tort remedy for intentional spoliation of evidence must be based on the recognition that "using tort law to correct misconduct arising during litigation raises policy considerations not present in deciding whether to create tort remedies for harms arising in other contents.

Id., (citing *Cedars-Sinai Med. Ctr. v. Superior Court*, 74 Cal. Rptr.2d. 248, 954 P.2d 511 (1998)).

Subsequent Remedial Measures

MD. RULE 5-407 (2008) governs when evidence of subsequent remedial measures may be admitted and provides:

> (a) In general. When, after an event, measures are taken which, if in effect at the time of the event, would have made the event less likely to occur, evidence of the subsequent

> measures is not admissible to prove negligence or culpable conduct in connection with the event.
>
> (b) Admissibility for other purposes. This Rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as (1) impeachment or (2) if controverted, ownership, control, or feasibility of precautionary measures.

The Rule is based on the corresponding Federal Rule, FED. R. EVID. 407. *See Mohammad v. Toyota Motor Sales, U.S.A., Inc.*, 179 Md. App. 693, 947 A.2d 598 (2008); *Angelakis v. Teimourian,* 150 Md. App. 507, 822 A.2d 494 (2003).

Use of Photographs

Photographs may be admissible under one of two distinct rules. *Washington v. State*, 179 Md. App. 32 (2008).

A) **Authentication.** Typically, photographs are admissible to illustrate testimony of a witness when that witness testifies from first-hand knowledge that the photograph fairly and accurately represents the scene or object it purports to depict as it existed at the relevant time. *Id. at* 44-45; *Dep't of Pub. Safety & Corr. Servs. v. Cole,* 342 Md. 12, 21, (1996). This method of authentication is known as the "pictorial testimony" theory.

B) **Silent witness.** The second method of authenticating photographs does not require first-hand knowledge. The "silent witness" theory of admissibility authenticates "a photograph as a 'mute' or 'silent' independent photographic witness because the photograph speaks with its own probative effect." *Washington* 179 Md. App. at 44-45 (2008) (quoting *Cole,* 342 Md. at 21); *see also Sisk v. State,* 236 Md. 589, 204 A.2d 684 (1964).

DAMAGES

Caps on Damages

A) **Economic damages.** There is no cap for economic damages (medical bills, lost wages, property damages) or punitive damages.

B) **Non-economic damages.** Non-economic damages are capped at $350,000.00 for damages for personal injuries for causes of action accruing between July 1, 1986 and September 30, 1994. The cap increased to $500,000.00 for actions arising on or after October 1, 1994. *See* MD. CODE ANN., CTS. & JUD. PROC., § 11-108 (2008). The cap is automatically increased annually by $15,000.00 on October 1 of each year. The increased cap applies to causes of action arising 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 $695,000.00 on October 1, 2007.

A single cap applies to the individual personal injury claim and the loss of consortium claim. *See Oaks v. Connors*, 339 Md. 24, 660 A.2d 423 (1995). In wrongful death cases, the maximum award of non-economic damages for two or more 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). Note that this means the maximum exposure in a case with a survivorship claim and a wrongful death claim equals 250% of the cap, plus any applicable economic damages.

Available Items of Personal Injury Damages

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) (2008); *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).

Lost Opportunity Doctrine

A) **Definitive loss.** The Lost Opportunity Doctrine, otherwise known as the 'Last Chance Doctrine,' addresses two distinct categories of complaints, the first of which has been referred to as a "definitive loss":

> [A] definitive loss ... involves the loss of a chance either of completely avoiding a specific harm or of achieving a fairly definitive favorable result. These types of claims include both materialized losses and anticipated future consequences (including loss of future benefits). A plaintiff might assert, for example, that had the decedent received timely treatment, he would not have died from the disease.

Goldberg v. Boone, 396 Md. 94, 127, 912 A.2d 698 (2006) (quoting Joseph H. King, Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences,* 90 YALE L.J. 1353, 1364 (1981)).

B) **Partial or less definitive losses.** The second category involves "partial or less definitive losses," *Goldberg*, 396 Md. at 127 (quoting *King*, 90 YALE L.J. at 1364) and typically involves claims that the tort "aggravated a preexisting condition, delayed its cure, failed to slow its progress, accelerated the onset of harm, or will have such effects in the future." *King*, 90 YALE L.J. at 1373. Therefore, even though the patient cannot recover

for the preexisting condition, he can recover for negligent acts further exacerbating the condition. *Goldberg*, 396 Md. at 127.

The Maryland Court of Appeals in *Fennell v. Southern Maryland Hospital Center*, 320 Md. 776, 580 A2d. 206 (1990) explained that loss of chance to survive meant "decreasing the chance of survival as a result of negligent treatment where the likelihood of recovery from the pre-existing disease or injury, prior to any alleged negligent treatment, was improbable, i.e., 50% or less." *Fennell,* 320 Md. at 781. The Court held that they were "unwilling to relax traditional rules of causation and create a new tort allowing full recovery for causing death by causing a loss of less than 50% chance of survival." *Id*. at 786-87. Thus, in order for a plaintiff to recover for a loss of chance of survival, a plaintiff must prove by a preponderance of the evidence that "it is more probable than not that defendant's act caused his injury." *Id.* at 787 (internal quotations omitted); *see also Goldberg v. Boone*, 396 Md. 94, 912 A.2d 698 (2006).

Mitigation

When one party breaches a contract, the other party is required by the 'avoidable consequences' rule of damages to make all reasonable efforts to minimize the loss sustained from the breach. The other party can charge the defending party only with such damages as, 'with reasonable endeavors and expense and without risk of additional substantial loss or injury, he could not prevent.' *Barrie School v. Patch*, 401 Md. 497, 933 A.2d 382 (2007); *Circuit City v. Rockville Pike,* 376 Md. 331, 829 A.2d 976 (2003). Mitigation of damages "helps to determine the proper amount of damages resulting from a breach of contract." *Barrie School*, 401 Md. 497.

However, when a contract has a valid liquidated damages clause, this is the remedy the parties to a contract have determined to be proper in the event of breach. *Barrie School*, 401 Md. At 512-513. Where the parties to a contract have included a valid liquidated damages clause that includes a reasonable sum that stipulates damages in the event of breach, that sum replaces any determination of actual loss. *Id.*

Punitive Damages

A) **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).

B) **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.

C) **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).

Recovery and pre- and post-judgment interest

A) **Prejudgment interest.** 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 unless 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., CTS. & JUD. PROC., § 11-301 (2008).

B) **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 (2008).

Recovery of Attorneys Fees

A) **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 its 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.

B) **Actions against insurers.** When the insured must resort to litigation to enforce a liability carrier's contractual duty to provide coverage for his or 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).

C) **Frivolous actions or pleadings.** MD. RULE 1-341 (2008) 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.

Settlement Involving Minors

The guardian or fiduciary of a minor is eligible to bring suit on behalf 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) (2008). 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 (2008). A court-approved settlement is only required in the event that the minor's parents cannot or will not approve the settlement, but it is sometimes advisable nonetheless.

Taxation of costs

MD. RULE 2-603(a (2008)) states: "Unless otherwise provided by rule, law, or order of court, the prevailing party is entitled to costs. The court, by order, may allocate costs among the parties." Costs however do not include attorney's fees or expert witness fees. *Bahena v. Foster*, 164 Md. App. 275, 883 A.2d 218 (2005).