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Recent Developments: Austin v. Thrifty Diversified: Employer's Liability Expanded While Employee on Employer's Premises

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to allow the use of some device to protect the witness from viewing the defendant. In such a case, the interest would outweigh the defendant's right to face-to-face confrontation.

The interest to protect child witnesses from literal face-to-face confrontation would be a proper compelling interest to allow something other than direct face-to-face confrontation. *Id.* Justice O'Connor continued noting that the confrontation clause "reflects a *preference* for face-to-face confrontation at trial...." *Id.* Furthermore, the *Coy* decision should not be read to discourage state legislatures from protecting child witnesses. Even if certain legislation is judged to run contrary to the confrontation clause, it might fall within an exception and thus the protection device may be used.

In a bitter dissent, Justice Blackmun, joined by the Chief Justice, felt that neither Coy's right to confrontation nor his due process right was violated.The dissent believed that the right to confrontation gives the defendant a "right to be shown that the accuser is real and the right to probe [the] accuser and [his] accusation in front of the trier of fact." *Id.* (Blackmun, J., dissenting). Justice Blackmun believed that these criteria were met in Coy's case. He noted that Coy could see the girls through the screen, the girls could see the judge, jury and counsel, and they could see the girls, the jury could see Coy while the girls testified, and the girls were told that Coy could see and hear them while they testified. *Id.* at 2806. The dissent argued that Coy's objection that the girls could not see him while they testified was too narrow. Justice Blackmun felt that the plurality's holding that the witness must have the ability to see the defendant will put a roadblock in front of state legislatures trying to protect child witnesses.

Justice Blackmun also felt that the confrontation clause has as its essential purpose the right of cross-examination. *Id.* at 2808. This was based on Dean Wigmore's statement that "[t]here never was at common law any recognized right to an indispensable thing called confrontation *as distinguished from cross-examination.*" 5 J. Wigmore, Evidence § 1397, 158 (J. Chadbourn rev. 1974). This principle is supported by the fact that many hearsay statements may be admitted at trial even though the defendant does not get to confront the person who made the hearsay statement. *Coy*, ___ U.S. at ___, 108 S. Ct. at 2809. As a further explanation of this point, Justice Blackmun gave an example of a blind person who could not see the defendant. With a blind person, however, the defendant could not make the same objection that Coy did. Therefore, Justice Blackmun felt that the right to cross-examine a witness was the essential part of the confrontation clause.

Justice Blackmun believed that the protection of children was an extremely important public interest to protect. Recognizing this, he felt that the use of the screen outweighed Coy's right to face-to-face confrontation with the girls.

Finally, Justice Blackmun concluded that the screen did not unduly prejudice Coy such that his due process was violated. He noted that a screen does not imply guilt as do other things like shackles. *Id.* at 2810. Furthermore, the jury was given an instruction which told them explicitly not to draw any inferences of guilt from the screen. Justice Blackmun felt this was sufficient to overcome Coy's due process argument. *Id.*

The plurality in *Coy* concluded that a defendant in a criminal trial has the right to literal face-to-face confrontation of the witnesses against him except in certain situations. These situations arise when there is a strong public policy interest which outweighs the right to confrontation. The *Coy* Court concluded that when a legislature enacts a statute based on general findings, it will not be enough to show a public interest that outweighs the right to confrontation. It should be noted, however, that Justice Kennedy did not participate in this decision in any way.

— *Richard M. Goldberg*

Austin v. Thrifty Diversified: EMPLOYER'S LIABILITY EXPANDED WHILE EMPLOYEE ON EMPLOYER'S PREMISES

The Court of Special Appeals of Maryland in *Austin v. Thrifty Diversified*, 76 Md. App. 150, 543 A.2d 889 (1988), rejected a wrongful death claim, but found that an employee who was injured after normal working hours while using his employer's equipment, on the employer's premises, and with the employer's permission, was covered instead under the exclusive remedy of the Worker's Compensation Act. The court agreed with the trial court that the employee's death arose out of and in the course of his employment.

Thrifty Diversified hired John Douglas Austin to work as a certified welder. On the day of the accident he received permission to use the company's arc welding machine to repair the exhaust system on a friend's automobile. Austin was to perform the repairs on the employer's premises after his regular shift ended. While using the arc welding machine to make the repairs, Austin was electrocuted.

Austin's parents instituted a wrongful death action. The employer moved for summary judgment on the grounds that the exclusive remedy was under the Worker's Compensation Act ("the Act"). The Act lists the duties that employers owe to their employees. It provides, in pertinent part, that:

> [e]very employer subject to the provisions of this article, shall pay or provide as required herein compensation according to the schedules of this article for the disability or death of his employee resulting from an accidental personal injury sustained by the employee arising out of and in the course of his employment without regard to fault as a cause of such injury....

Md. Ann. Code art. 101, §15 (1957). Therefore, the question addressed was whether this accident arose out of and in the course of the decendent's employment.

In answering this question, the court first looked at the causal connection between the injury and the employment. The court reasoned that but for his employment, Austin's death would not have ensued. Because he was an employee of Thrifty, Austin was allowed to use the company's arc welder for a personal project on their premises. "Moreover, the instrumentality of the death, the place where it happened, and the activity giving rise to it were the same as those he [Austin] encountered in his employment;" 76 Md. App. at 159, 543 A.2d at 894. The court concluded that the accident arose out of the deceased's employment.

The difficulty facing the court, however, was the question of "in the course of employment." Section 15 of the Worker's Compensation Act requires both "arising out of" and "in the course of employment." It is not an either/or test. Both factors must be present in order to apply the exclusive remedy of the Act.

To determine if the activity meets the "in the course of employment" test, it must be shown that the activity is sufficiently work-related to be an incident of employment. An activity is an incident of employment if "the employer expects or receives substantial benefit" from his employees participating in that activity. Md. App. at 160, 543 A.2d at 894.

The court found that compensation ben-

efits had been awarded in cases where the injury resulted from participating in recreational or social events. The court reasoned that allowing an employee to use his employer's equipment for personal projects on its premises also benefitted the employer in a similar fashion as participating in recreational or social events. The benefit to the employer in allowing and encouraging these activities is the creation and maintenance of good employer-employee relationships. Good employee morale benefits the employer. "The benefit expected by, or accruing to, the employer as a result of allowing personal projects to be done using its equipment and on its premises is no different than that flowing to the employer as a result of its sponsorship of recreational or social events." Md. App. at 162, 543 A.2d at 895. Therefore, Austin's activity met the "in the course of employment" requirement of section 15 of the Act.

In holding that such an activity arises out of and in the course of employment, the court of special appeals has expanded the employer's liability for the insurance of its employees. Accordingly, employers and their insurance companies will now find themselves with even greater responsibility for the activities of employees while on the employer's premises.

—Rita Kaufman

State v. Garlick:
CONFRONTATION RIGHT NOT OFFENDED BY ADMITTING LABORATORY TEST RESULTS INTO EVIDENCE WITHOUT TECHNICIAN'S TESTIMONY

In *State v. Garlick*, 313 Md. 209, 545 A.2d 27 (1988), the Court of Appeals of Maryland held that the respondent's right of confrontation was not offended by the admission into evidence of laboratory test results contained in his hospital record without the testimony of the hospital technician and without accounting for the technician's unavailability. In so holding, the court reversed the holding of the court of special appeals.

On June 16, 1985, the respondent Gary Ray Garlick (Garlick) was driving eastbound on U.S. Route 50. As he approached the Chesapeake Bay Bridge toll plaza at an excessive rate of speed, he swerved into another lane, smashing into the rear of a car waiting for change. The impact forced both cars past the toll booth. A police officer soon arrived and observed that Garlick was "extremely incoherent" and had "great difficulty" finding papers necessary for identification. The officer arrested Garlick, charging him with failure to reduce speed to avoid an accident, failure to stop and render aid, and driving under the influence of a controlled dangerous substance.

The officer took Garlick to Anne Arundel General Hospital where the emergency room physician, Dr. Joel R. Buchanan, Jr., examined Garlick. After Garlick gave abnormal responses to a neurological exam, the doctor ordered blood and urine tests. The blood test indicated that there was phencyclidine (PCP) present in Garlick's system.

The technician who administered the test did not appear at the trial in the Circuit Court for Anne Arundel County, and his report was not admitted into evidence. Dr. Buchanan, however, appeared as a witness, and the emergency room report, which referred to the test results, was admitted into evidence. Garlick's objection regarding the admissibility of this report was overruled. Although acquitted on the charge of failing to stop and render aid, Garlick was found guilty of driving while under the influence of a controlled dangerous substance and of failing to reduce speed to avoid an accident. The court of special appeals later determined that the blood test results, contained in the emergency room report, should not have been admitted into evidence and reversed the conviction. *Garlick v. State*, No. 12 (Md. Ct. Spec. App. filed Sept. 23, 1987).

The court of appeals granted certiorari to consider the admissibility of the test results.

The sixth amendment of the United States Constitution, made applicable to the states through the fourteenth amendment, and article 21 of the Maryland Declaration of Rights, provide that every defendant in a criminal prosecution has a right to confront the witness against him. This right "(1) insures that the witness will give his statements under oath...; (2) forces the witness to submit to cross-examination,...; [and] (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness making his statement...." *Lee v. Illinois*, 476 U.S. 530 (1986) (quoting *California v. Green*, 399 U.S. 149 (1970)).

Garlick argued that his right of confrontation was violated because the results of his blood test were admitted, although the hospital technician was not called to appear as a witness. To support this contention, he relied upon *Moon v. State*, 300 Md. 354, 478 A.2d 695 (1984), *cert. denied*, 469 U.S. 1207 (1985). In that case, the Court of Appeals of Maryland did not allow a hospital record to be admitted unaccompanied by the technician's testimony. The *Garlick* court, however, was unpersuaded by *Moon*, recognizing that the circumstances in the earlier case distinguished it from the case at bar.

In *Moon*, a blood sample was not analyzed until three days after it had been taken. In addition, the defendant's name did not appear on the report, and the tests were not performed until after the patient received the treatment for which the tests were sought. Considering these facts, the *Moon* court felt that the need for the technician to testify was "neither frivolous nor pointless." *Id.* at 370-71, 478 A.2d at 703. Moreover, one's confrontation right usually requires that if the hearsay declarant is unavailable for cross-examination at trial, proof of his unavailability must be offered. *Id.* at 367-68, 478 A.2d at 701-02. Nonetheless, the *Moon* court recognized instances involving "no confrontation violation because the evidence ... offered is clothed with substantial indicia of reliability. Such evidence is admitted without the declarant's testimony when producing the witness would likely prove unavailing or pointless. Business and hospital records fall within this category...." *Id.* at 369, 478 A.2d at 702-03.

The case *sub judice* turns on the business records exception to the rule against hearsay. The court relied on a 1925 case that examined this issue. *Globe Indemnity Co. v. Reinhart* held that the hearsay exception was based on the "circumstantial guaran-