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Lawrence S. Greenwald
Gordon Feinblatt LLC

Charles S. Hirsch
Ballard Spahr LLP

PERSONAL LIABILITY OF CORPORATE OFFICIALS IN EJECTMENT ACTIONS: EVOLUTION OF THE TORT AND THE IMPLICATIONS OF *METROMEDIA CO. V. WCBM MARYLAND, INC.*

Lawrence S. Greenwald† and Charles S. Hirsch‡

Most corporate officers and directors sleep easily at night believing that if they act solely in the best interest of their corporation and avoid activities that would permit the piercing of the corporate veil,[1] they are insulated from personal liability for actions taken on behalf of the corporation. The Court of Appeals of Maryland recently sent a wake-up call to corporate officers and directors in *Metromedia Co. v. WCBM Maryland, Inc.*[2] In *WCBM*, the court reaffirmed a long held, but frequently overlooked, principle — that corporate officers and directors are personally liable for tortious acts that they commit, inspire, or in which they participate, even if performed in the name of the corporation. What may add an extra jolt to an already restless group of corporate officials is that the underlying cause of action in *WCBM* was ejectment, an action that many people think of as strictly possessory. This article will discuss the nature and evolution of ejectment as a tort, the individual liability of corporate officials for tortious acts, and the *WCBM* case.

I. HISTORY OF EJECTMENT

Although misconceptions exist surrounding the nature of ejectment, it is historically a tort action. Ejectment originated at common law as a form of trespass.[3] At common law, a tenant could bring an action for ejectment to recover damages from a person who wrongfully ejected him from his premises.[4] Under the original form of an ejectment action, a plaintiff's recovery was limited to damages;

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† B.S., 1961, University of Pennsylvania; L.L.B., 1964, Harvard University; Partner, Gordon, Feinblatt, Rothman, Hoffberger & Hollander, Baltimore, Maryland.

‡ B.A., *cum laude*, 1983, University of Maryland; J.D., 1987, Georgetown University Law Center; Associate, Ballard, Spahr, Andrews & Ingersoll, Baltimore, Maryland.

1. *See* Bart Arconti & Sons, Inc. v. Ames-Ennis, Inc., 275 Md. 295, 310-12, 340 A.2d 225, 234-35 (1975) ("[T]he corporate entity will be disregarded . . . to prevent fraud . . . .").
2. 327 Md. 514, 610 A.2d 791 (1992).
3. Trespass has long been recognized as a common law tort. W. PAGE KEETON ET. AL., PROSSER AND KEETON ON THE LAW OF TORTS § 13, at 67 (5th ed. 1984).
4. ALLAN H. FISHER, ESSENTIALS OF MARYLAND PLEADING at 188-89 (2d ed. 1922); MARTIN NEWELL, NEWELL ON EJECTMENT 2 (1892).

he could not recover possession of the premises.[5] Recovery in ejectment actions was eventually expanded in the fifteenth century to include both damages and possession.[6]

Even in its expanded form, ejectment was available only to tenants, not landowners.[7] A landowner who sought to recover possession of his property had to bring "real actions" that have been described as involving "almost endless technicalities and subtleties."[8] In order to avoid the technicalities and subtleties associated with real actions, a practice developed in which the landowner would create a "straw" tenant who would lease the land from the landowner; the straw tenant would then file an action in ejectment to oust the "trespasser."[9] Since the straw tenant was only a nominal plaintiff suing on behalf of the landowner, his recovery was limited to possession of the property and nominal damages.[10] In order to recover actual damages,[11] the landowner had to bring a subsequent action for trespass, on the theory that once the defendant was adjudged to be wrongfully in possession of the property, he was liable to the landowner for trespass damages.[12]

This was the state of the common law of ejectment in England when it was adopted in Maryland.[13] The court of appeals discussed this history in one of its early ejectment cases:

> [When] the action of ejectment remained in its original state, and the ancient practice prevailed, the measure of the damages given by the jury, when the plaintiff recovered his term, were the profits of the land accruing during the tortious holding of the defendant. But as upon the introduction of the modern system, the proceedings became altogether fictitious, and the plaintiff merely nominal, the damages assessed became nominal also. . . . It was therefore

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5. Arthur G. Sedgwick & Frederick S. Wait, *The History of the Action of Ejectment in England and the United States*, *in* 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 611 (1909); HARRY M. SACHS, JR., POE'S PLEADING AND PRACTICE § 50, at 73 (6th ed. 1970).
6. NEWELL, *supra* note 4, at 7-8; SACHS *supra* note 5, at 73.
7. NEWELL, *supra* note 4, at 7-8; SACHS *supra* note 5, at 73-74.
8. NEWELL, *supra* note 4, at 8.
9. SACHS, *supra* note 5, at 73-74.
10. *Id.* at 74.
11. The damages available were *mesne* profits. *Mesne* profits are profits occurring during wrongful possession, BLACK'S LAW DICTIONARY 990 (6th ed. 1990), or specifically "the rents and profits, or the value of the use and occupation of the real property recovered in an action of ejectment during the period the property has been wrongfully withheld." NEWELL, *supra* note 4, at 606.
12. SACHS, *supra* note 5, at 74.
13. Maryland explicitly adopted the common law of England as it existed on July 4, 1776. MD. CODE ANN., CONST. art. 5 (Maryland Declaration of Rights).

necessary, to give another remedy, to the claimant for these damages.[14]

Unlike a minority of states, which changed the common law of ejectment to permit plaintiffs to recover damages under an implied contract theory,[15] Maryland left the essence of ejectment intact, although the legislature eventually simplified the action. In 1870 the legislature eliminated the need to use straw tenants when it enacted legislation that permitted a landowner to bring an action for ejectment in his own name.[16] In 1872, the legislature went a step further when it eliminated the need to bring two separate actions to recover possession and damages by permitting an aggrieved party to recover both possession and actual damages in a single action.[17] As a result of these changes, however, a plaintiff who files suit for ejectment *must* now pray for both possession and damages in his complaint; otherwise he is barred from recovering damages in a subsequent action.[18]

II. CURRENT STATE OF EJECTMENT

Despite its evolution and modernization, the nature of ejectment as a tort remains unchanged. The statutory changes, which eliminated the use of straw tenants and permitted plaintiffs to recover possession and damages in a single action, affected only the procedure itself, and left untouched the principles that govern the action.[19] The Court of Appeals of Maryland has repeatedly held that the damages recoverable in an action for ejectment are tort damages.[20] The court of

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14. Mitchell v. Mitchell, 1 Md. 55, 58-59 (1851) (quoting ADAMS ON EJECTMENT 379).
15. NEWELL, *supra* note 4, at 609 (stating in 1892 that the action of ejectment "is no longer treated as sounding in tort, but rather as one founded upon an implied contract"); *see, e.g.*, Holmes v. Davis, 19 N.Y. 488, 491-95 (1859) ("The Revised Statutes have prescribed as the measure of damages in this class of cases [ejectment] the same rule which would prevail in assumpsit for use and occupation. The compensation is to be adjusted as upon contract, and not upon the footing of a tort.").
16. SACHS, *supra* note 5, at 74.
17. *Id.* at 74 & n.68.
18. MD. RULE T40(4), T43; *see also* Strathmore Coal Mining Co. v. Bavard Coal & Coke Co., 139 Md. 355, 370, 116 A. 570, 575 (1921) (citing Gibbs v. Didier, 125 Md. 486, 94 A. 100 (1916)) (stating that if a plaintiff fails to recover damages in an ejectment action, the plaintiff is barred from recovering the same damages in a different suit).
19. FISHER, *supra* note 4, at 189.
20. *See Strathmore Coal Mining*, 139 Md. at 371, 116 A. at 575 (A plaintiff's "right to recover for damages suffered by him caused by the ejectment from and detention of the premises should be coextensive with his right to recover in trespass cases."). In Van Ruymbeke v. Patapsco Industrial Park, 261 Md.

appeals' treatment of damages in actions for ejectment accords with other states which have not altered the common law of ejectment.[21]

The court of appeals reaffirmed its view of damages in actions for ejectment in *Metromedia Company v. WCBM Maryland, Inc.*[22] The court in *WCBM* stated that "[a]n occupancy rightful because permissive becomes tortious when a proper demand to vacate is ignored and it is then the occupants become trespassers and damages for their wrongful occupancy begin to accrue."[23] Therefore, if an occupier of land refuses to vacate the premises upon the lawful demand of the owner or landlord, the occupier becomes a trespasser, i.e., a tortfeasor, and is liable for tort damages.

III. EJECTMENT PROCEDURE

Ejectment remains a cause of action to recover both possession of real property and damages resulting from the wrongful detention of the property. In order to prevail in an action for ejectment, a plaintiff must allege and prove that: (1) he has legal title to the property; (2) he has the right of possession; and (3) assuming damages are sought, he has suffered damages.[24] The damages recoverable are still designated as *mesne* profits,[25] defined as the annualized value of the premises wrongfully withheld,[26] but can include the rental value

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470, 485-86, 276 A.2d 61, 69 (1971), the court, quoting the trial judge, stated:

> "The Court recognizes that the profit of a business, in many instances, may be a true test of damages *in litigation of a tortious nature.* The Court is mindful that, indeed, *profits in an ejectment case such as this* may, under some circumstances, be such as to create or cause profit, business profits to be a factor in the determination of damages *for a wrongful invasion and continued possession of land such as would give rise to an ejectment action.*"

Id. (emphasis added).

21. *See, e.g.*, Wilkerson v. Gibbs, 405 So. 2d 1053, 1056 (Fla. Dist. Ct. App. 1981) (ejectment plus action for damages "now exists [as] only one single tort"); Falejczyk v. Meo, 176 N.E.2d 10, 12 (Ill. App. Ct. 1961) (action for *mesne* profits after judgment in ejectment "springs from a trespass and a tortious holding"); McDonald v. Stone, 321 S.W.2d 845, 846, 850-51 (Tenn. Ct. App. 1958) (ejectment action characterized as a tort in which punitive damages were recoverable).
22. 327 Md. 514, 610 A.2d 791 (1992).
23. *Id.* at 519, 610 A.2d at 794 (quoting Felt v. Sligo Hills, 226 Md. 190, 196, 172 A.2d 511, 514 (1961).
24. Janoske v. Friend, 261 Md. 358, 364, 275 A.2d 474, 477 (1971) (citing MD. RULE T42(b)).
25. MD. RULE T43.
26. Van Ruymbeke v. Patapsco Indus. Park, 261 Md. 470, 494, 276 A.2d 61, 73 (1921) (quoting MARTIN NEWELL, NEWELL ON EJECTMENT 607 (1982)); *see supra* note 11 and accompanying text.

of the premises or the profits derived by the wrongdoer from his use of the premises.[27]

IV. LIABILITY OF CORPORATE OFFICIALS IN EJECTMENT

In 1972 the Court of Appeals of Maryland discussed the liability of corporate officials for tortious acts committed by their corporations and stated as follows:

> The general rule is that corporate officers or agents are personally liable for those torts which they personally commit, or which they inspire or participate in, even though performed in the name of an artificial body . . . . [T]o make an officer of a corporation liable for the negligence of the corporation there must have been upon his part such a breach of duty as contributed to, or helped to bring about, the injury; he must have been a participant in the wrongful act.
>
> . . . But liability is not limited to tortious acts which he actually and physically commits; it extends as well to tortious acts which he actually brings about.[28]

This has been the rule in Maryland for more than 100 years.[29]

Since the refusal to vacate premises upon the lawful demand of the owner or landlord constitutes tortious conduct, corporate officers and directors are subject to personal liability for such conduct.[30] The principle that a corporate officer is personally liable for the tortious acts which he inspires the corporation to commit and the tortious acts of the corporation in which he participates has been applied to a variety of circumstances in addition to ejectment.[31]

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27. *See Van Ruymbeke*, 261 Md. at 492-94, 276 A.2d at 72-74 (holding that although it is proper to measure damages by the profits derived by the wrongdoer, rental value is a more appropriate measure when the wrongdoer's profits are uncertain, speculative, or remote).
28. Tedrow v. Deskin, 265 Md. 546, 550-51, 290 A.2d 799, 802-03 (1972) (citations omitted).
29. *See* Blaen Avon Coal v. McCulloh, 59 Md. 403, 418 (1883) (a corporate officer can be held liable for trespass committed by corporation); *see also* Bart Arconti & Sons, Inc. v. Ames-Ennis, Inc., 275 Md. 295, 312, 340 A.2d 225, 235 (1975) (discussing the general rule that officers and directors are liable for tortious conduct).
30. Metromedia Co. v. WCBM Md., Inc., 327 Md. 514, 518-22, 610 A.2d 791, 793-95 (1992).
31. *See* Tillman v. Wheaton-Haven Recreation Ass'n, 517 F.2d 1141, 1144 (4th Cir. 1975) ("[A] director who actually votes for the commission of a tort is personally liable, even though the wrongful act is performed in the name of

V. THE *WCBM* CASE

Metromedia Company ("Metromedia") was the sublessee of a parcel of land in Owings Mills, Maryland, from which it once operated a radio station.[32] In early 1987 Metromedia entered into an agreement with Magic 680, Inc. ("Magic 680") for the sale of its operating equipment and for the "sub-subleasing" of the premises.[33] Magic 680 subsequently defaulted on its obligations under its agreement with Metromedia, and Metromedia re-entered the premises and repossessed the equipment.[34] A receiver (the "Receiver") was appointed to preserve Magic 680's assets to satisfy the claims of its creditors, including Metromedia, and to maintain the broadcast license.[35]

Following these events, Metromedia sought to find another purchaser and eventually entered into negotiations with WCBM Maryland, Inc. ("WCBM") and its chief executive officer, Nicholas Mangione ("Mangione").[36] These negotiations resulted in the execution of five agreements.[37] Ultimately, the agreements were intended

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the corporation."); Zeman v. Lotus Heart, Inc., 717 F. Supp. 373, 375 (D. Md. 1989) ("[A]gents and employees of a corporation may become jointly and severally liable with the corporation for torts committed by them while in the scope of service to the corporation."); Fletcher v. Havre De Grace Fireworks Co., 229 Md. 196, 200-01, 177 A.2d 908, 910 (1962) (officers and directors of fireworks company personally liable for trespass if they directed, participated or cooperated in an act that wrongfully triggered explosions that damaged the plaintiff's property); Levi v. Schwartz, 201 Md. 575, 583-84, 95 A.2d 322, 327 (1953) (president of development company liable for company's tortious deprivation of adjacent landowner's lateral support); Moniodis v. Cook, 64 Md. App. 1, 14, 494 A.2d 212, 218-19 (officer of corporation who is responsible for corporation's decision to fire employee may be held individually liable for tort of wrongful discharge), *cert. denied*, 304 Md. 631, 500 A.2d 649 (1985).

32. *WCBM*, 327 Md. at 515, 610 A.2d at 792.
33. *Id.*
34. *Id.*
35. *Id.* at 515-16, 610 A.2d at 792.
36. *Id.* at 516, 610 A.2d at 792.
37. The parties entered into the following agreements:
    1. A "Lease Agreement" in which Metromedia leased the radio station equipment to the receiver of Magic 680 until February 28, 1989, or closing, whichever happened first.
    2. A "Sub-Sublease" in which Metromedia sub-subleased the Premises to the receiver of Magic 680 until February 28, 1989, or closing, whichever happened first.
    3. A "Consulting Agreement" in which the receiver of Magic 680 engaged WCBM to assist the receiver in operating the radio station. This agreement was terminable by either party upon 72 hours written notice.
    4. A "Purchase Agreement" in which the receiver of Magic 680 agreed to sell the broadcast license and radio station equipment to WCBM.

to assign the broadcast license, to sell the equipment, and to grant a sub-sublease of the premises to WCBM.[38] Under the agreements, the transaction was required to close no later than February 28, 1989. If the transaction did not close by the February 28, 1989 deadline, the agreements became null and void.[39] Moreover, the Federal Communications Commission's ("FCC") approval of the application to transfer the broadcast license was a condition precedent to closing, and therefore, if the FCC failed to approve the application by the February 28, 1989 deadline, the agreements became null and void.[40]

Pending FCC approval, Metromedia "sub-subleased" the premises to the Receiver, who in turn granted WCBM the right to operate the radio station.[41] The Receiver's right to possess the premises terminated upon closing, *i.e.*, upon the FCC's approval of the license transfer, or February 28, 1989, whichever occurred first.[42] The FCC failed to approve the application to transfer the broadcast license prior to the February 28, 1989 deadline.[43] Shortly thereafter, Metromedia demanded that the Receiver and WCBM vacate the premises.[44] WCBM refused to vacate the premises on the ground that it was entitled to remain on the premises until the FCC rendered a decision on the application.[45]

In October, 1989, Metromedia filed an action for ejectment against WCBM and its principal, Nicholas Mangione, seeking possession of the premises and damages.[46] At the conclusion of Metromedia's case, the trial court granted a motion for judgment in favor of Mangione.[47] The court stated that Metromedia failed to show that Mangione dealt with them as an individual during the course of the

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> FCC approval of the transfer of the broadcasting license to WCBM was a condition precedent to its obligation to close under this agreement. This agreement further provided that if closing were not concluded on or before February 28, 1989, it would become null and void.
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> 5. An "Agreement of Sub-Sublease" in which Metromedia agreed to sub-sublease the Premises to WCBM concurrently with the closing under the Purchase Agreement. This agreement provided that if closing were not consummated on or before February 28, 1989, it would become null and void.

Id. at 516 n.1, 610 A.2d at 792 n.1.

38. *Id.* at 516, 610 A.2d at 792.
39. *See supra* note 36.
40. *Id.* at 515-16, 610 A.2d at 792-93.
41. *Id.*
42. *Id.*
43. *Id.* at 517, 610 A.2d at 793.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*

transaction; therefore, the court held that Mangione could not be personally liable to Metromedia regardless of whether the jury found WCBM's conduct to be tortious.[48] In an unreported opinion, the court of special appeals affirmed the judgment in favor of Mangione.[49] The Court of Appeals of Maryland granted Metromedia's petition for writ of certiorari.[50]

The court of appeals reversed the decisions of the lower courts. The court of appeals held that if Metromedia could prove that (1) WCBM wrongfully retained possession of the premises, and (2) it was Mangione's decision as chief executive officer of WCBM not to vacate the premises, then the jury could justifiably return a verdict against Mangione personally for damages.[51]

VI. CONCLUSION

The common misperceptions about the individual tort liability of corporate officials can be potentially disastrous. This is especially true in the area of ejectment, which is not commonly thought of as a tort. The "corporate shield" does not insulate corporate officers and directors from liability for their own tortious conduct. Lawyers should be careful not to let these officials be lulled into a false sense of security.

48. *Id.*
49. *Id.* at 518, 610 A.2d at 793.
50. *Id.*
51. *Id.* at 522, 610 A.2d at 795.