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Recent Developments: Kuykendall v. Top Notch Laminates, Inc.: Maryland Refuses to Make Employers Liable for Injuries Caused by Employees Who Became Intoxicated at Their Office Parties

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satisfy the obligation as did an employer under § 6303(a). The court observed that "[i]n a civil action service of the government's complaint provides the [third-party lender] with all the notice required. . . ." 781 F.2d 974 at 981 (3d Cir. 1986).

Jersey Shore, dissatisfied with the court's ruling, petitioned the Supreme Court for a writ of certiorari. The Court granted the writ in order to resolve the inter-circuit conflict. The Court then went on to affirm the decision of the Third Circuit.

Chief Justice Rehnquist, writing for the Court, observed that there are three grounds for demonstrating a lack of connection between § 6303(a) and § 3505. First, I.R.C. § 3505 does not declare that a *lender* is "liable for unpaid taxes" which would give rise to the I.R.C. § 6303(a) notice requirement. Rather, a lender's liability under § 3505 only arises if it pays wages directly to an employee or supplies funds for the wages with *actual notice* or *knowledge* that the employer is either unable to make timely payment of the withholding taxes or has no intention of doing so. The Court found that a third-party lender is deemed to have such actual notice or knowledge from the time – in the exercise of due diligence – the lender would have been aware that the employer would not or could not make timely payments. "[A] prudent lender could be alerted to its liability under section 3505 at the time it engaged in what the government describes as net payroll financing. . . ." *Id.* at 87,115 (1987). Furthermore, the Court noted that, "[S]ureties can protect themselves against any losses attributable to withholding taxes by including this risk of liability in establishing their premiums, and lenders by including the amounts in their loans and taking adequate security." Citing, S. Rep. No. 1708, 89th Cong., 2d Sess., 23 (1966); H.R. Rep. No. 1884, 89th Cong., 2d Sess., 22 (1966).

Secondly, the Court considered the fact that employers and lenders are in different positions. While employers are subject to the government's summary collection procedures soon after unpaid employment taxes are assessed, the government may only forcibly collect against a lender by filing a civil suit in court. Thus, an employer has a far greater need for an assessment notice than a third-party lender who is not subject to summary collection procedures.

Lastly, the Court considered the actual content of the § 6303(a) notice. Under this section, the government must not only give notice to each person liable for unpaid tax but the notice must contain 1) the amount assessed and 2) the demand for payment. The Court pointed out that a third-party lender generally will not be concerned with the amount assessed because it may include the *employer's* share of the unpaid Social Security taxes for which the lender is not liable. *See*, H.R. Rep. No. 1884, 89th Cong., 2d Sess., 21 (1966). Thus, the notice required under § 6303(a) is likely to demand payment for an amount different from that for which the lender is liable.

This ruling by the Supreme Court makes clear that any lender who engages in net payroll financing is subject to suit, without the notice provided under 6303(a), if the employer fails to pay or deposit the required withholding taxes and the lender can be said to have actual notice or knowledge that the employer is not making timely withholding taxes.

– Robert R. Tousey

Kuykendall v. Top Notch Laminates, Inc.: MARYLAND REFUSES TO MAKE EMPLOYERS LIABLE FOR INJURIES CAUSED BY EMPLOYEES WHO BECAME INTOXICATED AT THEIR OFFICE PARTIES

In *Kuykendall v. Top Notch Laminates, Inc.*, No. 711 (Md. App. filed Feb. 9, 1987), the Court of Special Appeals of Maryland, affirmed the dismissal from the Circuit Court for Montgomery County, by holding that an employer who allegedly served alcohol to an employee at a party, who later crashed his car into an automobile, was not liable for his employee's actions.

Because the case was dismissed below, under Maryland Rule 2-322(2), the factual allegations advanced to Court of Special Appeals of Maryland were taken directly from the complaint, averring that Evelyn Hargis was killed instantly when the vehicle she was driving was struck head-on on December 23, 1985. Ms. Hargis was survived by her husband Jesse W. Kuykendall, and a minor daughter, Christina. The complaint stated that Charles E. Wilkes, Jr. and Robert Dean Wade, employees of Top Notch Laminates, Inc. (Top Notch), "were driving their separate cars while drunk." According to the allegations contained in the complaint, Wilkes and Wade were "swerving back and forth on the roadway trying to pass or to prevent the other from passing." During their "horse-play", Wilkes "swerved across the center line at a high rate of speed directly into the path of the car driven by Ms. Hargis." (slip op. at p. 1).

Immediately prior to this occurrence both Wilkes and Wade had been attending a Christmas party hosted by their employer Top Notch, attendance to which *was not required.* (Emphasis supplied). The complaint averred that Wilkes and Wade had been drinking "constantly from 12:30 p.m. to 5:00 p.m. and became highly intoxicated." The complaint further indicated that Top Notch knew of their intoxicated condition, but continued to serve both men alcoholic beverages. (*Id.* slip op. at 2). From these facts Mr. Kuykendall filed suit against Top Notch, for himself, as personal representative of Ms. Hargis' estate, and for the couple's minor daughter, Christina (Appellants). The Circuit Court for Montgomery County granted Top Notch's motion to dismiss, with which this appeal ensued.

On appeal, the court of special appeals was presented with the question of whether the employer could be held accountable for the actions of Wade and Wilkes, under traditional theories of negligence. As a preliminary matter, the court reviewed the elements of a negligence cause of action, (1) a legal duty, (2) a failure to perform the duty, (3) damage to the plaintiff, and (4) the damage occasioned by the defendant's failure to perform the duty. The appellants first argued that the legal duty owed by Top Notch was established because of the "special relationship" established between employer and employee. The appellants theory was based upon the *Restatement (Second) of Torts*, 315, which provides:

> "There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless
>
> (a) a *special relation* exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
>
> (b) a *special relation* exists between the actor and the other which gives to the other a right to protection." (Emphasis added). *Id.* slip op. at 6.

The appellants alleged that this relationship "conferred a duty upon Top Notch (the actor) to control the actions of Wilkes (the third person), as well as a duty to the general public to protect them from injury by Wilkes." (*Id.* slip op. at 6). This duty, appellants argued, was then breached when Top Notch permitted Wilkes and Wade to drive their own cars, because Top Notch chose not to prevent the two men from driving home while intoxicated.

Appellants' second argument was that the employer failed to exercise reasonable care to avoid injury to third persons, thereby relying on *Otis Engineering Corp. v. Clark*, 668 S.W.2d 307 (1983). In *Otis*, the Texas Supreme Court decided that, "an employer who knew his employee was incapacitated

because of intoxication but nevertheless escorted the employee to a motor vehicle and allowed him to drive away could be negligent." The Texas Supreme Court allowed the suit because in their view the employer had "failed to exercise reasonable care to avoid injury to third persons." (*Id.* slip op. at 7).

The Court of Special Appeals of Maryland in their opinion initially noticed the similarity between the appellants' cause of action and *Kelly v. Gwinnell*, 96 N.J. 538, 476 A.2d 1219 (1984), a case decided by the Supreme Court of New Jersey. After stating the issue of whether an employer who negligently "promotes and permits the intoxication of an employee at the employer's premises during business hours and in the course of an employer's party, and knowingly allows the intoxicated employee to drive from his employment and negligently collide with and kill another" can be held liable, the court examined the line of cases preceding the *Kelly* holding. *Kelly* stood for the proposition in New Jersey that a host at a party could be liable to a third party for actions of "a person who was drunk and who subsequently, in a motor vehicle collision, negligently injured the third party." (*Id.* slip op. at 3). The court in the case at bar clearly rejected such an application of the *Kelly* holding in Maryland, stating that *Kelly* did not suddenly appear, but "was the end product of a progression of decisions." *Id.* slip op. at 3. *See Rappaport v. Nichols*, 31 N.J. 188, 156 A.2d 1 (1959); *Soronen v. Olde Milford Inn, Inc.*, 46 N.J. 582, 218 A.2d 630 (1966); *Linn v. Rand*, 140 N.J.Super. 212, 356 A.2d 15 (1976). The court continued that such an adoption would be "out-of-the-blue", and not warranted because the general progression of cases preceding the *Kelly* decision in New Jersey, are not present in Maryland. Further, Maryland has "not adopted *Kelly* nor has it seen fit, either judicially or legislatively, to embrace a dram shop law action." *See Felder v. Butler*, 292 174, 438 A.2d 494 (1981); *State v. Hatfield*, 197 Md. 249, 78 A.2d 754 (1951); *Fisher v. O'Connor's, Inc.*, 53 Md.App. 338, 452 A.2d 1313 (1982). Continuing, the court opined that *Fisher* had specifically rejected the New Jersey decision in *Rappaport*, 53 Md.App. at 340, and that other jurisdictions shared the Maryland view.

The court then examined the argument presented by the appellants regarding the "special relationship." Although the court acknowledged that the Court of Appeals of Maryland in *Ashburn v. Anne Arundel County*, 306 Md. 617, 510 A.2d 1078 (1986), and *Lamb v. Hopkins*, 303 Md. 236, 492 A.2d 1297 (1985), had adopted the principle that there is no liability to a third person absent a "special relationship" with a clear right to control, the court in *Kuykendall* found that there was "nothing in the matter *sub judice* to suggest that Top Notch had a right to control Wilke's actions after business hours." (*Id.* slip op. at 6). In applying settled Maryland case law, the court found a number of factors for not imposing liability on the employer, Top Notch. The court stated that "for an employer to be vicariously liable for the acts of an employee, the employee must be acting within the scope of his or her employment." *Dhanraj v. Pepco*, 305 Md. 623, 506 A.2d 224 (1986); *Watson v. Grimm*, 200 Md. 461, 90 A.2d 180 (1951). First, the court found that the appellants had not indicated in their complaint that Wilkes was acting within the scope of his employment when the collision occurred. Second, the accident took place off the business premises, after working hours, and Wilkes was operating his own vehicle. Third, the court reasoned since the party was not mandatory, the party could not have been furthering a business purpose of the employer, and therefore the employer could not be held vicariously liable for the acts of its employee, Wilkes. *Id.* slip op. at 7.

When the court examined the second argument of the appellants it noted that *Otis* apparently followed a California case, *Brockett v. Kitchen Boyd Motor Co.*, 264 Cal.App. 2d 69, 70 Cal.Rptr. 136 (1968). The California court found that "affirmative acts" of the employer, and ordering him to drive home "imposed a duty on the employer to exercise reasonable care." *Id.* slip op. at 8. The Court of Special Appeals of Maryland then distinguished the *Otis* and *Brockett* cases, by examining *Pinkham v. Apple Computer, Inc.*, 699 S.W.2d 387 (Tex.App. 1985). *Pinkham* dealt with an employee at a company cookout. The court there in holding for Apple Computer, Inc. found that the company did not take any affirmative acts. Similarly, the Court of Special Appeals of Maryland found that Top Notch took no affirmative act with respect to Wilke's operation of a motor vehicle. *Id.* slip op. at 9.

In addition to examining the appellants' arguments, the court examined the legislative intent in expressly not establishing a dram shop act. The court stated that the legislature, not the courts, should create such an act. The court pointed out that recent annual meetings of the General Assembly had not deemed such an act necessary. One explanation offered by the Court of Special Appeals of Maryland was the illogic of holding an employer liable when an employee voluntarily becomes intoxicated and then injures a third party while liquor licensees, those in the business of dispensing alcoholic beverages, are not civilly liable to injured third persons. *See Felder v. Butler*, 292 Md. 174, 438 A.2d 494 (1981); *Fisher v. O'Connor's, Inc.*, 53 Md.App. 338, 452 A.2d 1313 (1982).

The Court of Special Appeals of Maryland has declined the opportunity to expand the law to allow the recovery of damages from employers under the circumstances of this case, which might have been called "The Employers' Dram Shop Law." The lack of an affirmative act by Top Notch, or a showing of vicarious liability by the appellants was decided by the court to leave the question of imposing such liability on employers in the hands of either the General Assembly or the Court of Appeals of Maryland in its role as "law giver".

–Robert L. Kline, III

Attorney Grievance Commission v. Gilbert: ATTORNEY DISBARRED FOR FAILURE TO DISCLOSE MATERIAL INFORMATION ON HIS BAR APPLICATION

In Attorney Grievance Commission v. Gilbert, 307 Md. 481, 515 A.2d 454 (1986), Gilbert was disbarred due to his failure to disclose, what the court considered, material information on his bar application. The court of appeals rendered this extreme sanction because of the seriousness of Gilbert's misconduct, which reflected on his fitness to practice law.

The nondisclosed item was Gilbert's answer to question ten on his 1980 application. Question ten required:

> "a complete list of all suits in equity, actions at law, suits in bankruptcy or other statutory proceedings, matters in probate, lunacy, guardianship, and every other judicial or administrative proceedings of every nature and kind, except criminal proceedings to which I am or have ever been a party. (If 'NONE' so state)."

Gilbert at 457.

The answer given was "NONE". In reality, Gilbert had filed a civil suit in the Circuit Court of Baltimore County on June 4, 1970 to recover the benefits of two insurance policies on his wife's life, which he obtained three months prior to her murder. The problem with the nondisclosure, which made it material, was that Gilbert was found in the civil trial to have had a part in the murder, consequently he was denied recovery. Specifically, Judge Proctor, who heard the civil trial, commented in his opinion that "[T]he evidence is overwhelming that Gilbert intentionally caused the death of his wife in order to reap the