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# Recent Developments: Attorney Grievance Commission v. Gilbert: Attorney Disbarred for Failure to Disclose Material Information on His Bar Application

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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. Gwinnett*, 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 Md. 494, 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. 494, 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

harvest, namely the proceeds of these two life insurance policies . . ." *Gilbert* at 459.

Afterwards Judge Raymond G. Thieme, Jr. of the Circuit Court for Anne Arundel County held evidentiary hearings pursuant to Md Rule BV9 and used Judge Proctor's findings to conclude that Gilbert purposefully failed to disclose the civil suit and this nondisclosure was material so as to violate DR 1-101(a) and DR 1-102 & (4) of the ABA Model Code of Professional Responsibility. A judge's factual findings are prima facie correct and will not be changed unless clearly erroneous. *Attorney Grievance Comm. v. Kemp* 303 Md. 664, 674, 496 A.2d 672 (1985). The court of appeals indicated that a person with a law degree should be able to read question ten as clearly asking for any and all involvement in civil litigation and dismissed Gilbert's claim that he had misread the question.

Gilbert was not a novice with the court system as he had confrontations with the law on many occasions during a six month period in 1967. During this period, Gilbert "was charged with conspiracy to commit forgery, forgery and uttering, murder and accessory to murder, homicide and assault." *Gilbert* at 455. Out of these charges he was adjudicated guilty for forgery and uttering and he was imprisoned between November 1970 and August 1972. Shortly after these charges, Gilbert was arrested for the murder of his wife on June 4, 1967. On March 13, 1969, Gilbert and his sister were indicted for murder and conspiracy to commit murder. When Gilbert's sister was acquitted, his charges were nol prossed on June 24, 1974.

Gilbert finally graduated from law school in 1980 and completed the application in question on May 20, 1980. Shortly thereafter, Gilbert's petition "for expungement of all the records associated with the nol prossed indictment for his wife's murder" was granted on June 23, 1980. *Gilbert* at 455. He passed the July 1980 Bar Examination and the next step was the character investigation to determine a candidate's present moral fitness to practice law in Maryland.

The *initial committee* (character committee of the third judicial circuit), on October 21, 1980, recommended unanimously not to grant admission. The State Board of Law Examiners, pursuant to Rule 4c, concluded by a 3-2 vote that Gilbert be admitted since he had the present moral character fitness to practice law. The weight used in these proceedings is clear and convincing evidence. See *In re Application of James G.*, 296 Md. 310, 462 A.2d 1198 (1983). In that case, the court looked at Gilbert's hardships through the years including "the birth of a Down's Syndrome

child during his first marriage and the fact that his first wife [was murdered]." *Gilbert* at 485. In determining his present moral character, the court noted that the history of criminal action occurred 16 years ago and was within a six month period. Also, the murder charge was nol prossed, and since 1981 Gilbert had practiced in the District of Columbia without incident.

However, when the civil suit came to the attention of the Attorney Grievance Commission (AGC), they conducted evidentiary hearings and filed a petition for disciplinary action. Gilbert insisted his nondisclosure was neither purposeful or material. Judge Thieme thought otherwise for the following reasons: Gilbert's contention that the application was done in haste was discounted because by looking at the dates of his signatures it was determined that at least three days transpired before the application was submitted and the non disclosure of the civil suit was purposeful because Gilbert had many opportunities to provide this information, but did not.

The court of appeals found the context of the word "material" as used in DR 1-101(a) had never been previously defined in Maryland. The court used several analogies to other areas of law such as summary judgment—"whether the resolution of any material matter of fact may affect the outcome of the case," *King v. Bankered* 303 Md 98, 111, 492 A.2d 688 (1985); and insurance—an "ommission" is material if it would affect the insurer's decision about providing insurance or evaluating the risk." *Maryland Indemnity v. Steers*, 221 Md. 380, 385, 157 A.2d 803 (1960). The court decided to adopt the definition that the Supreme Court of North Dakota applied in *In re Howe*, 257 N.W. 2d 420 (N.D. 1977), which dealt with the same rule as the case at bar. Their definition of a material omission is one that "has the effect of inhibiting the efforts of the bar to determine an applicant's fitness to practice law." *Id.* at 422. Overall, the various standards reflect on how the decision-making process is affected by a particular fact or representation.

The court held that the nondisclosure of the civil suit enabled Gilbert to use his expungement in a self-serving manner that "plainly inhibited efforts to assess Gilbert's present moral character fitness to practice law." *Gilbert* at 460. Therefore, the omission was clearly material. Gilbert relied on *In re Application of G.L.S.*, 292 Md. 378, 439 A.2d 1107 (1982) where there was nondisclosure of a criminal conviction. However, that case is easily distinguishable because G.L.S. volunteered additional information during the admission process unlike Gilbert.

Gilbert's other contentions were also found to have no validity. Gilbert asserted that the civil suit had no bearing on the disciplinary proceedings, but the court ruled it was relevant in determining whether the omission was deliberate which has a direct bearing on one's present moral character. Gilbert also complained that his mother, father and a witness from his earlier trial should have been allowed to testify at the hearing. However, the witness' veracity was not at issue so his testimony was properly excluded. The only testimony allowed from Gilbert's parents was what state of mind Gilbert had as he worked on the application and at no other time. Furthermore, Gilbert contends that the disciplinary hearings had the effect of convicting him of his wife's murder thereby denying him due process of law. However, this is misplaced because the findings did not determine guilt or innocence, but only had a bearing on his fitness to practice law.

Thus, the court of appeals has provided some guidelines as to what they consider a material omission on a bar application. If this omission reflects on a candidate's truthfulness and candor, which is the most important character qualification, *AGC v. Levitt*, 286 Md. 238, 406 A.2d 1298 (1979), then strong disciplinary action will be called for. To determine if a purposefully dishonest omission or misrepresentation requires disbarment as the proper sanction, the court will mainly look to the severity of the misconduct and any compelling extenuating circumstances.

—Robert Feldman

### ***Department of Natural Resources v. Welsh: SOVEREIGN IMMUNITY DID NOT BAR ACTION TO QUIET TITLE***

In a recent decision, the Court of Appeals of Maryland held that: (1) sovereign immunity did not bar action to quiet title based on the Department of Natural Resources' allegedly unconstitutional taking, and (2) that the department had not acquired interest in land belonging to plaintiff's predecessors, who had not been named as parties in earlier condemnation proceeding. *Dep't. of Natural Resources v. Welsh*, 308 Md. 54, 517 A.2d 722 (1986). As a result of this decision, the Rocky Gap State Park in Allegany County has lost a thirty three acre tract of land.

In 1983, W. Mitchell Welsh brought suit against the Department of Natural Resources to quiet title to land. Apparently, in 1966, the department obtained title to a 1,000 acre tract in Allegany County through a condemnation proceeding. The