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Recent Developments: B & K Rentals and Sales Co. v. Universal Leaf Tobacco Co.: Maryland Abandons Speaking Authority Requirement and "Res Gestae" Approach and Binds Principal by Agent's Statements Pursuant to F.R.E. 801(d)(2)(D)

Gloria A. Worch

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tion,” it declined to find that situation in *Alexander*. *Id.* at 711. The court instead vacated the punitive award and remanded for retrial the questions of whether, and in what amount, A & A’s conduct justified a punitive damages award. The court also suggested specific instructions for the jury on remand.

The *Alexander* opinion provides fresh insight on how the Maryland state courts should determine punitive damages. Though the court determined that the standards set by case law were sufficient, it also acknowledged that Maryland courts in the past may have limited themselves too much in reviewing punitive damage awards. With the *Haslip* decision in mind, the court in *Alexander* gave appellate courts a green light for considering due process when examining punitive damage awards.

The *Alexander* case also serves to remind attorneys and judges of the importance of jury instructions for punitive damage awards. Juries must be told that punitive damages serve to punish wrongdoers and deter others from similar conduct. Juries need to be aware of the standards for actual malice and other factors, such as the wrongdoer’s net worth and ability to pay in order to make an informed decision.

- Catherine E. Head

***B & K Rentals and Sales Co. v. Universal Leaf Tobacco Co.*: MARYLAND ABANDONS SPEAKING AUTHORITY REQUIREMENT AND “RES GESTAE” APPROACH AND BINDS PRINCIPAL BY AGENT’S STATEMENTS PURSUANT TO F.R.E. 801(d)(2)(D).**

In *B & K Rentals and Sales Co. v. Universal Leaf Tobacco Co.*, 596 A.2d 640 (Md. 1991), the Court of Appeals of Maryland held that a statement of a party opponent’s agent, which concerns a matter within the scope of agency or employment and is made during the existence of that relationship, may constitute an admission by the party opponent. By so ruling, the court of appeals adopted the principle

embodied in Federal Rule of Evidence 801(d)(2)(D) and abandoned the traditional common law approach which required “speaking authority” before the statement was considered an admission of the principal.

B & K Rentals and Sales Co. (“B & K”) stored equipment used in its business of renting scaffolding and seating for public gatherings in a portion of a warehouse owned by Universal Leaf Tobacco Co. (“Universal”). B & K brought an action for damages against Universal, contending that the negligence of Universal and its employees caused a fire which resulted in a substantial amount of damage to B & K’s equipment. Only two Universal employees were present and working at the warehouse on the day of the fire, one of whom died in the fire. B & K never deposed or subpoenaed the surviving employee, Leonard Grimes. The parties disputed both the availability of the surviving employee as a witness and B & K’s efforts to locate him at the time of the trial.

The case turned on the testimony of an expert witness, Lieutenant Kenneth J. Klasmeier, a fire investigator with the Anne Arundel County Fire Department. Lt. Klasmeier based his testimony on a written report he received from another Anne Arundel Fire Department Investigator, Lieutenant James Stallings. Lt. Stallings based his report, regarding his investigations of the origin and cause of the fire, primarily on Grimes’ statements at the scene of the fire. Grimes told Lt. Stallings that:

- 1) Johnson and he were the only two people working at the warehouse at the time of the fire;
- 2) Grimes had lit an acetylene torch for Johnson a couple of hours before the fire;
- 3) Johnson was using the torch to burn strings caught in the jack wheels of a wooden dolly;
- 4) Grimes heard a popping noise and saw smoke coming from the area where Johnson

had just finished burning the string from the jack wheels; and

5) Grimes believed the cause of the fire was related to Johnson’s use of the acetylene torch.”

Id. at 641.

The trial court excluded both Stallings’ and Klasmeier’s reports. The court ruled that the reports were inadmissible because each relied on Grimes’ hearsay statements, and neither qualified as admissions of a party opponent or as part of the *res gestae* exception. *Id.* at 642. The court of special appeals affirmed. The Court of Appeals of Maryland granted certiorari to consider the laws under which evidence of admissions of party opponents were admissible.

The court began its analysis by re-examining the development of Maryland’s case law on vicarious admissions. The court noted that Maryland courts traditionally implemented an evidentiary standard based on agency law. Under this traditional test, the court required an agent to have “speaking authority” before his statements qualified as an admission of the principal. *Id.* at 643 (citing *Brown v. Hebb*, 175 A. 602, 607 (Md. 1934)).

The court recognized the problems inherent in the application of the traditional test of agency law as an evidentiary standard. The court pointed out that the narrow formula of admissibility under the traditional test was problematic because it “frequently caused courts to exclude the agent’s highly probative statement on the theory that the employer had not authorized the agent to make damaging remarks about him.” *Id.* at 643. (quoting 4 J. Weinstein & M. Berger, *Weinstein’s Evidence*, § 801(d)(2)(D)[01] at 219 (1988)).

The court next considered Maryland’s expansion of the traditionally narrow formula of admissibility through the adoption of the *res gestae* exception to the hearsay rule.

Id. In setting forth the *res gestae* exception, the court held that "in order to bind the principal and thus constitute an admission by it, the agent's statement not only must concern matters within the scope of his own agency authority but must also be part of the *res gestae*, i.e., made contemporaneously with the transaction to which it relates." *Id.* (quoting *Burkowske v. Church Hosp. Corp.*, 439 A.2d 40, *cert. denied*, 293 Md. 331 (Md. 1982)).

The court then looked at the failure of the Maryland courts to uniformly apply the contemporaneity aspect of the loosely defined *res gestae* exception. The court stated that the contemporaneity requirement is a totally unnecessary component of the hearsay exception for vicarious liability. *Id.* at 644. The reliability of the agent's statements stems from the assurance that, "[t]he agent is well informed about acts in the course of the business, his statements offered against the employer are normally against the employer's interest, and while the employment continues, the employee is not likely to make the statements unless they are true." *Id.* at 644 (quoting *McCormick on Evidence* § 267, at 788-89 (3d ed. 1984)).

The court acknowledged the general disfavor of the *res gestae* exception in academic and judicial circles. The court noted that the phrase "is condemned in academic circles as 'a substitute for reasoning' and resulting in 'the confusion of thought inevitably accompanying the use of inaccurate terminology.'" *Id.* (quoting *Morgan, A Suggested Classification of Utterances Admissible as Res Gestae*, 31 *Yale L.Rev.* 229, 229 (1923)). Concluding that the phrase *res gestae* was too "nebulous," the court adopted the more precise analysis embodied in Fed. R. Evid. 801(d)(2)(D). *Id.* at 645. Federal Rule of Evidence 801(d)(2)(D) provides that a statement made by an agent of a party opponent which concerns a matter within the scope of the agency or employment

and is made during the existence of that relationship constitutes an admission of the party opponent.

The court then cited a variety of factors which contributed to its decision to abandon the traditional common law rule in favor of the Federal Rules of Evidence approach. The court noted that the *res gestae* phrase came into use when the theory of hearsay was not well developed and the various exceptions lacked clear definitions. The court pointed out that the "[i]ncreased knowledge as well as the guidance of a significant majority of other states and the federal rules" indicated that the traditional approach was "too restrictive and unsound." *Id.*

The court further justified its decision to adopt the provisions of F.R.E. 801(d)(2)(D) by noting various principles of fairness espoused by other jurisdictions that have already adopted the Federal Rules of Evidence approach. The court relied on the official comments to section 801(D)(3)(a) of Louisiana Code's Evidence Article to show the unfairness of the employers position under the common law approach. "[I]t may be said that, in accord with principles of substantive law, one who undertakes to create an agency relationship should generally be made to reap the deleterious as well as the beneficial effects of what the agent sows." *B & K*, 596 A.2d at 646 (quoting official comment to La. Code Evid. Ann. art. 801(D)(3)(a) (West 1986)). Furthermore, the court noted the F.R.E. 801(d)(2)(D) is more equitable than the common law, in that the judge is given discretion to weigh the probative value of the evidence against the possibility for prejudice to the opponent.

Applying the Federal Rules of Evidence approach to the case before it, the court of appeals held that Grimes' statement at the scene of the fire was admissible. The court concluded that there was sufficient evidence, independent of the statements, to prove "that 1) Grimes was Universal's agent; 2) Grimes' statements concerned ac-

tivities undertaken in the warehouse that were within the scope of his employment; and 3) Grimes' statements were made during his employment." *Id.* at 647.

The *B & K* decision is significant in that the court of appeals abandoned the strict common law approach which required that the agent have "speaking authority" or that the agent's statement be part of the *res gestae*. Thus, the court illustrated its dissatisfaction with the exclusion of valuable probative evidence, which was the frequent result under the common law approach and adopted the approach under the Federal Rules of Evidence.

- Gloria A. Worch

Newell v. Richards: BURDEN OF PROOF AS TO STATUTE OF LIMITATIONS DEFENSE DOES NOT SHIFT TO PLAINTIFF REGARDLESS OF FINDINGS OF HEALTH CLAIMS ARBITRATION PANEL.

In *Newell v. Richards*, 594 A.2d 1152 (Md. 1991), the Court of Appeals of Maryland held that a health claims arbitration award in favor of the defendant health care provider, which was based solely on the running of the statute of limitations, did not serve to shift the ultimate burden of proof to the plaintiff with respect to the running of the statute of limitations. In reversing the court of special appeals, the court held that a health claims arbitration award would be presumed correct as an evidentiary matter, but would not serve to shift the burden of proof from the defendant to the plaintiff as to the statute of limitations.

In July of 1980, Estella Newell was diagnosed at the Greater Baltimore Medical Center ("GBMC") as having cancer of the uterus and on September 30, 1980, she underwent a total hysterectomy. Follow-up treatment consisted of external radiation treatments administered by Dr. George J. Richards, Jr., which took place