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Recent Decisions

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Attorneys' Fees — Standard For Fixing Attorneys' Fees Under Anti-Trust Laws. *Noerr Motor Freight v. Eastern Railroad Pres. Conf., 166 F. Supp. 163 (E.D. Pa. 1958).* Plaintiff obtained a judgment in a private action under the Sherman Anti-trust law. He was entitled under the statute to treble damages ". . . and the cost of the suit including a reasonable attorneys' fee." 15 U.S.C.A. (1951) § 15. Generally speaking, a reasonable attorneys' fee in such a judgment is within the discretion of the trial court and an appellate court will intervene only if this discretion has been abused. Here the District Court suggested a test in which seven factors are to be considered in determining a reasonable fee. These factors are: (1) whether plaintiff's counsel had the benefit of a prior judgment or decree in a case brought by the government; (2) the standing of counsel at the bar — both counsel receiving the award and opposing counsel; (3) time and labor spent; (4) magnitude and complexity of the litigation; (5) responsibility undertaken; (6) the amount recovered; and (7) the knowledge the Court has of the conferences, arguments that were presented and work shown by the record to have been done by attorneys for plaintiff prior to trial. The test is then stated to be "what, in the opinion of the Trial Judge, after considering all the factors in the case (including but not limited to those outlined above) would be a reasonable charge for the services of plaintiffs' counsel?" [170].

In addition to the test stated in the present case, the court pointed out that two other tests have been proposed. *Cape Cod Food Products v. National Cranberry Ass'n.,* 119 F. Supp. 242 (D.C. Mass. 1954), set forth the test as to what constituted a reasonable attorneys' fee within the meaning

of the Clayton Act as " 'what it would be reasonable for counsel to charge a victorious plaintiff. The rate is the free market price, the figure which a willing successful client would pay a willing, successful lawyer' " [169]. The other test was proposed in *Webster Motor Car Co. v. Packard Motor Car Co.,* (Holtzoff, J., unreported), cited in the instant case. The judge here made no attempt to fix the fee a lawyer should charge his client, but instead stated: "Although there are some expressions to the contrary, it is the view of this Court that in such a case as this, it is not the function of the court to fix the fee that counsel should charge his client, and then assess that against the defendant. My conception is that it is the duty of the court to determine what contribution shall be made by the defendant toward the fees of plaintiff's counsel. I say lest there be any misunderstanding, it is not my intention to determine or express an opinion or even an intimation how much plaintiff's counsel should charge his client" [169].

Conflict Of Laws — Alienation Of Affections. *Albert v. McGrath, 165 F. Supp. 461 (D.C.D.C. 1958).* Plaintiff brought an action in the District Court for the District of Columbia to recover for alienation of her husband's affections. The alleged misconduct between defendant and plaintiff's husband was said to have taken place in the District of Columbia at a time when both the plaintiff and her husband were Maryland residents. Since Maryland has abolished the action for alienation of affections, 7 MD. CODE (1957) Art. 75C, § 1, plaintiff's recovery had to be under the law of the District of Columbia where such actions are still allowed. The District Court found that the law of the state of the matrimonial domicile, Maryland, governed in the present case, and rendered a judgment n.o.v. for the defendant. The court concluded that for purposes of alienation of affection suits the law of the place where the injury is sustained is the governing law and that the situs of the matrimonial domicile is the only place where the injury can be sustained. For a case reaching an opposite result see *Gordon v. Parker,* 83 F. Supp. 40 (D. Mass. 1949), 178 F. 2d 888 (1st Cir. 1949), although the conflict of laws question was not raised on the appeal. See also 41 Mich. L. Rev. 83, 89-98 (1942).

Corporations — Retention Of Corporate Criminal Liability After Dissolution. *Melrose Distillers, Inc. v. United States, 258 F. 2d 726 (4th Cir. 1958).* Appellant corpora-

tions were convicted under the Sherman Act, 15 U.S.C.A. (1951) §§ 1, 2, of conspiring to fix liquor prices and attempting to monopolize interstate trade and commerce. The indictments under which appellants were convicted were issued prior to appellants' dissolution and were pending at the time of dissolution. Appellants maintained that dissolution of the corporate defendants extinguished any criminal liability of the corporation arising from criminal proceedings pending at the time of dissolution. The Court of Appeals for the Fourth Circuit held that under 2 MD. CODE (1957) Art. 23, §§ 76(b), 78 and 8 DEL. C. (1953) § 278, criminal as well as civil liability of a corporation survives dissolution. The Court of Appeals in construing the Delaware statute followed the view taken by the Seventh Circuit in *United States v. P. F. Collier & Son Corp.*, 208 F. 2d 936 (7th Cir. 1953). For a case reaching the opposite conclusion as to the meaning of the Delaware Statute see *United States v. Line Material Co.*, 202 F. 2d 929 (6th Cir. 1953). The United States Supreme Court has granted certiorari in the present case.

Criminal Law — De Novo Appeal. *Moulden v. State, 217 Md. 351, 142 A. 2d 595 (1958).* Defendant appealed from a sentence of the People's Court of Montgomery County, under the de novo appeal procedure of 6 MD. CODE (1957) Art. 66½, Sec. 325. The Circuit Court hearing the case de novo imposed a sentence upon the defendant in excess of the sentence given him by the People's Court. The court then suspended the execution of these sentences and placed the defendant on probation. Defendant violated probation, and the Circuit Court struck out the suspensions of sentences and reinstated them in conformity with its original pronouncement. Defendant contends that the Circuit Court acting in its special limited jurisdiction as an appellate court, has no power to impose sentences in excess of that imposed by the magistrate of the People's Court. Defendant relied upon 1 MD. CODE (1957) Art. 5, Secs. 30 and 39, which he asserted stripped the Circuit Court of the power to increase any fine imposed by a magistrate or impose imprisonment for more than thirty days upon default in payment of such fines.

The Court of Appeals held that 6 MD. CODE (1957) Art. 66½, Sec. 1, which makes Art. 66½ the exclusive and controlling state-wide law as to matters covered by it unless the legislature specifically otherwise provides, was not specifically contradicted by 1 MD. CODE (1957) Art. 5, Secs.

30 and 39. Therefore, the Circuit Court possessed the authority on a de novo appeal to impose any fine within limits set by the applicable statutes [6 MD. CODE (1957) Art. 66½, Secs. 112, 206, 209], and to require imprisonment for more than thirty days in default in payment of fines [4 MD. CODE (1957) Art. 38, Sec. 4]. The Court of Appeals in the instant case noted that earlier Maryland cases have given indications that Maryland followed the general rule on de novo appeal, *i.e.*, "the upper court hears the case as if it were being tried for the first time, and considers the entire matter of verdict, judgment and sentence as though there had been no trial below" [356].

See *Green v. State,* 170 Md. 134, 183 A. 526 (1936), *Robb v. State,* 190 Md. 641, 60 A. 2d 211 (1948), *Johnson v. State,* 191 Md. 447, 62 A. 2d 249 (1948), and *Hite v. State,* 198 Md. 602, 84 A. 2d 899 (1951), for cases involving appeals to the Circuit Court. See also Baltimore City Charter (Flack 1949), Sec. 411, which provides for a de novo appeal in certain cases involving a justice of the peace assigned to a police station in Baltimore City.

Due Process — Privilege Against Disclosure Of Identity Of Informer. *McCoy v. State, 216 Md. 332, 140 A. 2d 689 (1958).* Defendant was convicted of violating the narcotics drug law. During the trial, in which accused was charged with the sale of narcotics to an informer, the State failed to call the informer as a witness. Defendant contended that this failure to produce the informer amounted to a denial of due process. In affirming the lower court's conviction, the Court of Appeals recognized the principle that the State ordinarily possesses a privilege of non-disclosure and is not required to divulge the names of persons who furnish information concerning violations of the law to a law officer. This privilege is, however, subject to some qualifications. The privilege does not exist, for instance, in such cases as the present one where the informer is an integral part of the illegal transaction, unless the informer was already known to the accused or the accused failed to make a proper demand for the identity of the informer at the trial.

In the present case defendant knew the informer's identity and yet failed to call him as a witness or request that the State explain his absence. In addition to this, police officers had voluntarily disclosed the name of the informer during the course of the trial. Under these circumstances the Court held that the failure of the State to

produce the informer did not amount to a denial of due process. See also McCORMICK, EVIDENCE (1954) 309, Sec. 148, 8 WIGMORE, EVIDENCE (3d ed. 1940), 755, Sec. 2374 (2); 60 Yale L. J. 1091 (1951) and 63 Yale L. J. 206 (1953).

Insurance — Alteration Of Policy Application. *Syme v. Bankers National Life Insurance Company, 393 Pa. 600, 144 A. 2d 845 (1958).* Insured signed an application for an insurance policy with a face value of $25,000 and family benefits of $250 per month. The general agent of the insurer placed an addendum on the face of this application after the insured had signed it, requesting that another policy be issued to insured with a $25,000 face value, but with increased family benefits of $500 per month. Insured accepted the policy providing for the $500 benefits in lieu of the policy he had originally requested. In an action by the beneficiaries on the policy, insurer denied liability on the basis of allegedly false statements made by insured in his application. The Supreme Court of Pennsylvania concluded that the statements made by the insured in his policy application could not be used as a basis of a defense in the action on the policy. A Pennsylvania statute, 40 PURDON'S P.S. (1954) § 441 provided that:

> "All insurance policies, . . . in which the application of the insured, . . . form part of the policy or contract between the parties thereto, or have any bearing on said contract, shall contain, or have attached to said policies, correct copies of the application as signed by the applicant, . . . ; and, unless so attached and accompanying the policy, no such application . . . shall be received in evidence in any controversy between the parties . . . , nor shall any such application . . . be considered a part of the policy or contract between such parties."

The Court held that the general agent's addendum had rendered insured's original policy application incorrect within the meaning of the statute and that this precluded the insurer from using any false statements insured might have made in the "incorrect" copy. The court rejected insurer's argument that the insured had ratified the policy change by his acceptance of the new policy.

5 MD. CODE (1957) Art. 48A, § 169 provides that no alteration of a life insurance application can be made without the insured's consent. Sec. (b) provides:

> "Any insurer issuing such insurance contract upon such application unlawfully altered by its officer, employee, or agent shall not have available in any action arising out of such contract, any defense which is based upon the fact of such alteration, or as to any item in the application which was so altered."

Furthermore, § 170 provides that a true copy of the application must be attached to any issued policy for the application to be admissible in evidence.

As yet these statutes have not been construed, but if the decision of the Pennsylvania court is indicative of the Maryland attitude, the cumulative effect of these provisions might be sufficient to bar the defensive use of insured's application by the insurer in similar circumstances.

Taxation — Relocation Expenses. *United States v. Woodall, 255 F. 2d 370 (10th Cir. 1958)* Plaintiff accepted a job on condition he would be reimbursed for expenses he incurred in moving his family to the new job location. Plaintiff contended the money he received for his moving expenses did not constitute income within the meaning of 1954 I.R.C. § 61 and in the alternative, that he was entitled to a business deduction under 1954 I.R.C. § 162. The Court of Appeals for the Tenth Circuit in reversing a lower court decision in favor of the taxpayer, held that the payments were income and disallowed the business expense deduction. " 'The job, not the taxpayers' pattern of living, must require the travel" [373] for the expense deduction to be allowed. The court stressed the fact that plaintiff's expenses were incurred in obtaining employment but not in the course of employment.

Taxation — Trade Or Business Expense. *John W. Clark v. Commissioner, 30 TC No. 140, CCH Tax Ct. Rep. Dec. 23, 190 (1958).* Plaintiff seeks to deduct attorney's fees and expenses incurred in the defense and settlement of an assault suit. Petitioner, the branch manager of a company engaged in soliciting magazine subscriptions, was charged with assault with intent to rape a prospective employee. Plaintiff had a business duty to interview and obtain the consent of husbands before hiring their wives as employees. Petitioner was visiting the prospective employee's home for the purpose of obtaining this consent when the assault allegedly occurred. The Tax Court, four judges dissenting, allowed both deductions as ordinary and necessary business

expenses under 1954 I.R.C. § 162. The Tax Court, after accepting petitioner's testimony as to what actually took place at the time of his visit, found that taxpayer's expenses were sufficiently connected with petitioner's trade or business to allow the deductions. Since the criminal charges against the petitioner were dismissed, the court presumed he was innocent of the acts charged.

Torts — Immunity Of Charitable Institutions. *Collopy v. Newark Eye and Ear Infirmary, 27 N.J. 29, 141 A. 2d 276 (1958).* Plaintiff brought an action to recover for the negligence of the defendant hospital. Defendant claimed immunity from any tort liability by virtue of its status as an eleemosynary institution. The appellate court held that New Jersey no longer recognizes the doctrine that charitable institutions are immune from tort liability. The court based its decision on the general principle that it is basically unjust to allow a charitable institution to avoid responsibility for torts which it has committed.

Maryland has long recognized the immunity of charitable institutions from tort liability, basing this exemption on the so-called "trust fund" theory: See *Perry v. House of Refuge,* 63 Md. 20 (1885); *Loeffler v. Sheppard-Pratt Hosp.,* 130 Md. 265, 100 A. 301 (1917); and article, 5 Md. L. Rev. 336 (1941). However, 5 MD. CODE (1957) Art. 48A, § 85, which requires insurance policies issued to charitable institutions for the purpose of covering tort liability to contain a provision that the insurer will be estopped from asserting the immunity defense, appears to furnish a possibility for recovery by the injured party up to the amount of the insurance carried, although several decisions indicate procedural difficulties in perfecting the relief: *Thomas v. Prince George's County,* 200 Md. 554, 92 A. 2d 452 (1952), noted, 15 Md. L. Rev. 170 (1955); *Gorman v. St. Paul Fire Ins. Co.,* 210 Md. 1, 121 A. 2d 812 (1956), noted 17 Md. L. Rev. 159 (1957); and *State v. Arundel Park Corporation,* ..... Md. ....., 147 A. 2d 427 (1959).

In a *per curiam* opinion, ... Md. ....., ... A. 2d ..... (1959), The Daily Record, Feb. 28, 1959, the Court of Appeals again flatly refused to repudiate the immunity doctrine, saying that to do so would be "judicial legislation", and with reference to CODE, Art. 48A, Sec. 85, that: "There is no merit in the contention that the appellee defendant in this case should be liable because it was insured for general liability, as professional negligence, which forms the basis of this suit, was excluded from coverage."

Trade Names — Extent Of Protection Afforded Holder Of Trade Name. *Great A. & P. Co. v. A. & P. Trucking Corp., 51 N.J.S. 412, 144 A. 2d 172 (1958).* Plaintiff retail store sought to enjoin defendant from using letters "A & P" on its trucks and stationery as part of defendant's corporate name. The appellate court granted limited relief by requiring defendant to reduce the "A & P" to the same size, spacing and color as the rest of its corporate name but refused to enjoin the use altogether.

The court acknowledged that a prior user of a trade name may obtain injunctive relief even against a non-competing user of its trade name if there is a strong likelihood of harm to the prior user's business resulting from the subsequent user's conduct. The court adopted the view of 3 RESTATEMENT, TORTS (1938), § 730, Comment b, p. 599: "The issue in each case is whether the goods, services or businesses of the actor and of the other are sufficiently related so that the alleged infringement would subject the good-will and reputation of the other's trade-mark or trade name to the hazards of the actor's business." In the present case the court found that the plaintiff had failed to show that any harm had been, or would be, caused to plaintiff's business by use of defendant's trade name. Still, the appellate court did extend some limited relief to the plaintiff, chiefly on the basis advanced by the lower court, i.e., "in order that complete equity may be accomplished in the instant case" [174].

The Maryland Court of Appeals has frequently stated the view that the basis for relief in trade name — unfair competition cases is constantly expanding. So far, however, where the possibility of confusion caused by similarity of trade names has been found to exist, a disclaimer of connection by the subsequent user with the business of the prior user has been held to afford sufficient protection to said prior trade name user. *A. Weiskittel Co. v. Weiskittel Co.*, 167 Md. 306, 173 A. 48 (1934); *Nat. Shoe v. Nat. Shoes of N. Y.*, 213 Md. 328, 131 A. 2d 909 (1957). The Maryland court's attitude toward trade names is well set out in the *National Shoe* case at p. 339: "While courts have been slow to enjoin altogether the use of similar names, they have not been slow to minimize confusion, where a probability of confusion is shown." See *Hecht v. Rosenberg*, 165 Md. 116, 166 A. 440 (1933); *Drive It Yourself Co. v. North*, 148 Md. 609, 130 A. 57 (1925); *Bedding Corporation v. Moses*, 182 Md. 229, 34 A. 2d 338 (1943); *Edmondson*

Vil. Theatre v. Einbinder, 208 Md. 38, 116 A. 2d 377 (1955); *A & H Trans. v. Save Way,* 214 Md. 325, 135 A. 2d 289 (1957). See also 3 MD. CODE (1957) Art. 27, § 191 which makes fraudulent use or imitation of a trade name a misdemeanor punishable by a fine of $100 a day as long as the offense is repeated.

Unauthorized Practice Of Law — Labor Unions. *In re Brotherhood of Railroad Trainmen, 13 Ill. 2d 391, 150 N.E. 2d 163 (1958).* Sixteen lawyers located throughout the United States entered into a legal aid agreement with a railroad trainmen's union. These lawyers were designated by the union as regional counsel for its legal aid program and as such handled claims arising from injuries or deaths of the Brotherhood's members occurring within the scope of their employment.

Under this arrangement the lawyers charged a contingent fee of 25% of any amount recovered, paid all expenses of investigation and litigation and paid the total cost of operating the union legal aid department. The union, in turn, distributed to its injured members blank copies of contracts employing the regional counsel's firm as their attorney and also urged its members to employ regional counsel.

An Illinois statute [ILL. REV. STAT. (1957 Supp.), Chap. 13, § 15] provided that:

> "It shall be unlawful for any person not an attorney at law to solicit for money, fee, commission, or other remuneration directly or indirectly in any manner whatsoever, any demand or claim for personal injuries or for death, for the purpose of having an action brought thereon, or for the purpose of settling the same."

The Court held that the activities of the labor union fell within the purview of the statute and therefore condemned these activities as constituting the unauthorized practice of the law. The Court went on to outline how the union might operate its legal aid program in the future without becoming guilty of unauthorized practice. The union may maintain an investigation staff and investigate all circumstances under which its members are injured. The Brotherhood may also make known the advisability of obtaining legal advice before making a settlement and the names of attorneys who in its opinion have the capacity to handle

such claims successfully. The union, however, can no longer have any financial connection with lawyers; nor can any lawyer pay any amount whatsoever to the union or its officers or members as compensation, reimbursement of expenses, or gratuity in connection with the procurement of a case. In addition, the union may no longer fix attorney's fees, nor allow its members to carry lawyer employment contracts to other injured members.

The Supreme Court based its decision on the necessity of keeping the relation of attorney-client both a personal and an individual one.

Maryland has similar, although more general statutes than Illinois; see Rec. Dec., 18 Md. L. Rev. 358 (1958).

Unfair Competition — Medicine — Use Of Similar Nonfunctional Color Barred. *Norwich Pharmacal Co. v. Sterling Drug, Inc., 167 F. Supp. 427 (N.D.N.Y. 1958).* Plaintiff has since 1900 manufactured and distributed in a clear glass bottle a pink-colored stomach remedy known as Pepto-Bismol. In 1955, defendant marketed a pink-colored stomach remedy in a clear glass bottle under the name of Pepsamar. The evidence disclosed that defendant's sole reason for the selection of the color pink was to make defendant's product appear as much as possible like plaintiff's product. Defendant also utilized the color pink in the advertising of its product. The District Court issued an injunction restraining defendant from simulating the pink color of plaintiff's product unless defendant concealed the color by use of a dark bottle. The injunction also restrained defendant from using this descriptive pink color in advertising its product. The Court found that defendant had intentionally copied nonfunctional attributes of plaintiff's product and had failed to show that no likelihood of confusion would arise from this simulation. See Recent Decision on Trade Names, *supra,* p. 88, for Maryland cases in the unfair competition area.