FOR MORE INFORMATION

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Maryland

Are preventability determinations and internal accident reports discoverable or admissible in your state? What factors determine discoverability or admissibility?

The issue of whether preventability determinations are admissible in Maryland has yet to be litigated. With regard to internally prepared reports, Maryland codified the *Hickman* doctrine for protection of work product in Md. Rule 2-402(d): "a party may obtain discovery of documents, electronically stored information, and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative … only upon a showing that the materials are discoverable ... and that the party seeking discovery has substantial need for the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means."

Discoverability and subsequent admissibility will turn on the question of whether the report at issue was prepared in "anticipation of litigation" or was a record generated in the normal course of business. Note that "[d]etermining whether a document or other tangible thing was prepared in anticipation of litigation or for trial is essentially a question of fact, which, if in dispute, is to be determined by the trial judge following an evidentiary hearing." *E.I. du Pont de Nemours & Co. v. Forma-Pack, Inc.*, 351 Md. 396, 409, 718 A.2d 1129, 1135 (1998)

In determining whether particular materials were prepared in anticipation of litigation, courts examine whether or not they were created in the ordinary course of business. *APL Corp. v. Aetna Cas. & Sur. Co.*, 91 F.R.D. 10, 18 (D.Md.1980).

In Maryland, the initial burden to show that a document is protected under the work product doctrine is on the party attempting to shield the record. Once that party has met this requirement, the burden shifts to the party seeking the information to show substantial need and undue hardship. *See EI DuPont, supra*, at 412.

Does your state permit discovery of 3rd party litigation funding files and, if so, what are the rules and regulations governing 3rd party litigation funding?

Maryland state courts have yet to address the issue of third-party litigation financing. The general rules of discovery set forth in the Maryland Rules of Civil Procedure would likely govern, at this point, whether third-party litigation funding files are discoverable. Rule 2-401 provides that a party may obtain discovery of any matter relevant to the subject matter involved in the pending action.

In Federal Court in Maryland, the Federal Local Rule is "When filing an initial pleading… counsel shall file a statement (separate from any pleading) containing…[t]he identity of any corporation, unincorporated association, partnership, or other business entity, not

a party to the case, which may have any financial interest whatsoever in the outcome of the litigation, and the nature of its financial interest." D. Md. L.R. 103.3(b).

Likewise, the Local Rule for the Fourth Circuit is that "[a] party…must identify any publicly held corporation, whether or not a party to the present litigation, that has a direct financial interest in the outcome of the litigation by reason of a…profit sharing agreement…or state that there is no such corporation." 4th Cir. L.R. 26.1(a)(2)(B)

Recently, in *In re Sanctuary Belize Litig*., the U.S. District Court in Maryland found that, after reviewing a litigation financing agreement between a commercial litigation finance firm a formerly pro se Plaintiff, that the information was discoverable and that "any term sheet and any further litigation financing agreement" had to be turned over as part of the litigation. 2021 WL 2875508, at *2 (D. Md. July 8, 2021).

What is the procedure for the resolution of a claim for injuries to a minor in your state? Does the minor's age affect the statute of limitations for a personal injury claim?

Generally, in Maryland, a minor may not file suit to recover for personal injuries suffered due to the negligence of a third party. Nevertheless, the child and his or her parents may accumulate thousands of dollars in medical bills. As a result, claims are commonly brought on behalf of the minor by the child's parents or guardian. Such claims frequently result in the child receiving compensation through a settlement or judgment award before reaching the age of 18. However, to protect the rights of minors, the Maryland legislature enacted statutes requiring the parents and alleged tortfeasor to take proper care in ensuring that the payment received ultimately goes to the child.

Judicial Determination to Settle on Behalf of Minor

In general, a parent, guardian, or next friend who files suit on behalf of a minor may settle the claim on his or her behalf without court approval. MD. INS. § 19-509; MD. CTS. & JUD. PROC. § 6-405. However, there are certain situations in which court approval may be needed in order to settle on the child's behalf. Md. Rule § 2-202(c)(2) describes when court approval is needed:

> (A) If the next friend is the only living parent of the minor, the settlement need not be approved by a court.
>
> (B) If the next friend is not the only living parent of the minor, the settlement must be approved (i) by each living parent of the minor, or (ii) after a reasonable attempt at notice to each living parent and an opportunity for a hearing, by a court.
>
> (C) If there are no living parents of the minor, the settlement must be approved by a court.
>
> (D) A motion for court approval shall be filed in the court where the action is pending.

Once a settlement offer is reached, and, if needed, received court approval, there are still steps that all adult parties involved must take to ensure the minor receives his or her payment.

Disbursement of Funds to Minor

Maryland's Estates and Trusts Article protects minors from mistreatment or misappropriation of funds that were intended for their benefit. In fact, MD. CODE ANN., EST. & TRUSTS § 13-402 expressly states that it is Maryland's public policy "that any substantial sum of money paid to a minor because of a claim, action, or judgment in tort

should be preserved for the benefit of the minor."

If a minor receives a settlement or judgment of $5,000.00 or more (exclusive of attorney's fees and costs), Title 13 protections must be followed. MD. CODE ANN., EST. & TRUSTS § 13-403. The "person responsible for payment" must issue a check made to the order of: John Doe, trustee under Title 13 of the Estates and Trusts Article, Annotated Code of Maryland, for Jane Doe, minor. Id. § 13-403(a).

The "person responsible for the payment" means: "(1) The attorney, if the minor or any person acting for him is represented by an attorney; or (2) Any defendant, insurer, or the State . . . if the minor or any person acting for him is not represented by an attorney." MD. EST. & TRUSTS § 13-401.

There is no paperwork required to be appointed a trustee; a trustee in this context is anyone responsible for the money. Id. § 13-403(b).

Should the court appoint a guardian of the property of a minor, the person responsible for payment must issue a check made to the order of: John Doe, guardian under Title 13, Subtitle 2 of the Estates and Trusts Article, Annotated Code of Maryland, for Jane Doe, minor. Id. § 13-403(d).

Following the issuance of the check, the trustee or guardian must deposit the check into a separate bank account set aside for the minor when he or she turns 18. Id. § 13-404(a); 13-405(a). The money may not be withdrawn except to pay the minor upon turning 18 years old or to pay the personal representative of his estate upon his death prior to reaching 18 years. Id. § 13-405(a).

A minor's age can affect the statute of limitations for a personal injury claim in Maryland. Under Maryland law, the statute of limitations for personal injury claims is generally three years from the date of the injury (Md. Cts. & Jud. Proc. Code § 5-101). However, if the injured person is a minor, the statute of limitations may be extended.

Specifically, Maryland law provides that if the injured person is under the age of 18 at the time of the injury, the statute of limitations does not begin to run until the minor reaches the age of 18 (Md. Cts. & Jud. Proc. Code § 5-201). This means that a minor who is injured at the age of 10, for example, would have until their 21st birthday to file a personal injury claim.

What are the advantages or disadvantages in your State of admitting that a motor carrier is vicariously liable for the fault of its driver in the context of direct negligence claims?

In Maryland, the advantage of admitting vicarious liability precludes a plaintiff from pursuing a negligent entrustment claim.

In *Houlihan v. McCall*, 197 Md. 130 (1951), the Court of Appeals held that the trial court erred in allowing into evidence the individual defendant's driving record when the plaintiffs were alleging (1) negligence on the part of the individual defendant driver and (2) negligence on the part of the employer in "selection or retaining a driver known to be incompetent and reckless." 197 Md. at 137. The Court found that, because the defendants admitted agency, "it was quite unnecessary [for the plaintiffs] to pursue the alternative theory in order to hold the corporate defendant [liable]," and that, in order to hold the corporate defendant liable, the plaintiffs merely needed "to prove negligence on the part of the driver." *Id*. at 137–38. The Court cited the evidentiary complication of allowing both vicarious liability and negligent entrustment claims to proceed, reasoning that "[w]here a driver's known incompetence is in issue, the exclusionary rule must yield, no doubt, to the necessity of permitting proof of previous misconduct," such as a defendant's past traffic offenses, but "where agency is

admitted it can serve no purpose except to inflame the jury." *Id*. at 140. "Maryland Court of Appeals' decision in Houlihan clearly supports Defendant's contention that Plaintiff cannot proceed with its negligent entrustment claim once vicarious liability has been admitted." *Day v. Stevens*, No. CV 17-02638-JMC, 2018 WL 2064735, at *5 (D. Md. May 3, 2018)

"Under Maryland law, a plaintiff seeking only compensatory damages cannot bring a negligent entrustment claim against an owner of a vehicle, where the owner has admitted that the driver of the vehicle was his agent or employee." *Villalta v. B.K. Trucking & Warehousing, L.L.C.*, Civ. No. DKC–2007–1184, 2008 WL 11366412 (D. Md. Aug. 4, 2008) citing *Houlihan*, 197 Md. at 137–38. The Supreme Court of Maryland "found it would be both unnecessary and improper to allow the plaintiff to proceed against the owner under both negligent entrustment and agency theories" because it would "allow the introduction of prejudicial evidence of the driver's past traffic offenses." *Id*.

What is the standard applied for spoliation of physical and/or documentary evidence in your state?

In Maryland, the standard applied for spoliation of physical and/or documentary evidence is the "bad faith" standard. This means that a party seeking sanctions for spoliation of evidence must show that the other party acted in bad faith by intentionally destroying or failing to preserve evidence that they knew or should have known was relevant to the case. MPJI-Cv 1:10 (Maryland civil pattern jury instruction) reads: "The inferences permitted depend on the jury's finding of the party's intent in destroying the evidence. If done to conceal, the destruction is subject to a much broader inference than if it was done merely negligently. "

"Spoliation is the destruction, mutilation or alteration of evidence by a party to an action." *Miller v. Montgomery Co.,* 64 Md.App. 202, 494 A.2d 761 (1984).

There are four elements prerequisite to a court's imposition of spoliation sanctions:

1. An act of destruction;
2. Discoverability of the evidence;
3. Intent to destroy the evidence;
4. The occurrence of the act at a time after suit has been filed, or, if before, at a time when the filing is fairly perceived as imminent.

Klupt v. Krongard, 126 Md.App. 179, 199, 728 A.2d 727, 737 (1999).

The court has "wide discretion" to impose any sanction allowed under Md.Rule 2-433(a), regardless of whether there is a finding of prejudice. *Id*. at 201, 728 A.2d at 738.

The doctrine is premised upon the principle that a party should not be allowed to support its claims or defenses with physical evidence that it has destroyed to the detriment of its opponent. When determining whether spoliation has occurred, a court considers whether there has been an act of destruction, whether the destroyed evidence was discoverable, whether there was an intent to destroy the evidence, and whether the destruction occurred at a time after suit has been filed, or, if before, at a time when the filing was fairly perceived as imminent. *Adventist Healthcare, Inc. v. Mattingly*, 244 Md. App. 259, 274 (2020)

Is the amount of medical expenses actually paid by insurance or others (as opposed the amounts billed) discoverable or admissible in your State?

Maryland law recognizes the "collateral source rule," which generally prohibits the admission of evidence that shows the plaintiff received compensation from a source other than the defendant for the same injury. However, this rule does not apply to the amount of medical expenses actually paid, as opposed to the amounts billed, as that amount is considered more relevant to the plaintiff's damages.

The collateral source rule has been applied in Maryland since 1899. City Pass. Ry. Co. v. Baer, 90 Md. 97, 44 A. 992 (1899). The rule generally provides that payment by a collateral source to a plaintiff for items of damage cannot be set up by the tortfeasor as mitigation or as a reduction of damages. The rule permits an injured person to recover the full amount of his or her provable damages, "regardless of the amount of compensation which the person has received for his [or her] injuries from sources unrelated to the tortfeasor," and generally prohibits presentation to a jury of evidence of the amount of medical expenses that have been or will be paid by health insurance. *Haischer v. CSX Transportation, Inc*., 381 Md. 119, 132, 848 A.2d 620, 627 (2004) (*quoting Motor Vehicle Admin. v. Seidel*, 326 Md. 237, 253, 604 A.2d 473, 481 (1992) ("Payments made or benefits conferred by other sources are known as collateral-source benefits. They do not have the effect of reducing the recovery against the defendant.").

There are, however, several potential exceptions to the rule, such as in medical malpractice cases. *See* Md. Code Ann., Cts. & Jud. Proc. § 3-2A-05(h). Likewise, if there is an allegation of a malingering plaintiff, "the evidence of collateral payments is admissible . . . but evidence as to collateral payments is inadmissible in the absence of evidence of malingering or exaggeration or where the real purpose of the evidence offered as to collateral sources is the mitigation of liability for damages of the defendant." *Kelch v. Mass Transit Admin*., 42 Md. App. 291, 296, 400 A.2d 440 (1979), aff'd, 287 Md. 223, 411 A.2d 449 (1980).

What is the legal standard in your state for obtaining event data recorder ("EDR") data from a vehicle not owned by your client?

Maryland courts have found that black box data is sufficiently reliable to support qualified expert testimony in some circumstances (*see, e.g., Easter v. State*, 223 Md. App. 65 (2015)), and the Maryland Appellate Court has cited with apparent approval cases in other jurisdictions that have more broadly concluded that data from motor vehicle recording systems are reliable and admissible. *Id.* at 80-81 (citing *Com. v. Zimmermann*, 70 Mass. App. Ct. 357, 873 N.E.2d 1215 (2007), *People v. Christmann*, 3 Misc. 3d 309, 776 N.Y.S.2d 437 (Just. Ct. 2004), and *Bachman v. Gen. Motors Corp.*, 332 Ill. App. 3d 760, 776 N.E.2d 262 (2002)). Additionally, accident animations and computer-generated evidence are not *per-se* inadmissible, and may be admitted subject to the existing rules of evidence. Hence, EDR is discoverable and admissible.

What is your state's current standard to prove punitive or exemplary damages against a motor carrier or broker and is there any cap on same?

In Maryland, the "purpose of punitive damages is ... to punish the defendant for egregiously bad conduct toward the plaintiff, [and] also to deter the defendant and others contemplating similar behavior." Owens–Corning v. Garrett, 343 Md. 500, 537–538, 682 A.2d 1143, 1161 (1996). "Awarding punitive damages based upon the heinous nature of the defendant's tortious conduct furthers the historical purposes of punitive damages—punishment and deterrence." *Owens–Illinois v. Zenobia*, 325 Md. 420, 454 (1992).

In the *Owens–Illinois v. Zenobia* case, the Supreme Court of Maryland adopted a clear and convincing evidence

standard for the award of punitive damages. The court reasoned that the "[u]se of a clear and convincing standard of proof will help to insure that punitive damages are properly awarded." *Id*. at 469.

Consequently, "with respect to both intentional and non-intentional torts, ... an award of punitive damages must be based upon actual malice, in the sense of conscious and deliberate wrongdoing, evil or wrongful motive, intent to injure, ill will, or fraud." *Bowden v. Caldor, Inc.*, 350 Md. 4, 23, 710 A.2d 267, 276 (1998).

Not all the forms of "actual malice" are pertinent to every type of tort action. For example, in a defamation action, punitive damages are not recoverable based upon ill will, spite, or an intent to injure; instead, to recover punitive damages, the plaintiff must establish that the defamatory falsehood was made with actual knowledge that it was false. *See LeMarc's Management Corp. v. Valentin*, 349 Md. 645, 709 A.2d 1222 (1998)

Finally, a plaintiff has no right or entitlement to punitive damages under Maryland law. "[T]he trier of fact has discretion to deny punitive damages even where the record otherwise would support their award." *Adams v. Coates*, supra, 331 Md. 1, 15 (1993).

There is no cap on punitive damages in Maryland, but there is a requirement that they be proportionate to the amount of compensatory damages awarded. In Maryland, the amount of punitive damages "must not be disproportionate to the gravity of the defendant's wrong." *Ellerin v. Fairfax Savings*, supra, 337 Md. 216, 242 (1995). Likewise, it has been "long recognized under Maryland law, is that the amount of punitive damages should not be disproportionate to ... the defendant's ability to pay." *Bowden v. Caldor, Inc.*, *supra*, 350 Md. At 28.

Has your state had any noteworthy recent punitive damages verdicts? If so, what evidence was admitted supporting issuance of a punitive damages instruction? Finally, are any such verdicts currently on appeal?

In Maryland, punitive damages are incredibly rare and are only awarded in limited circumstances. The rendering of a punitive damage award requires "actual malice" on the part of a defendant and are used "in attempt to punish defendant whose conduct is characterized by evil motive, intent to injure, or fraud, and to warn others contemplating similar conduct of serious risk of monetary liability." *Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, 460-69, 601 A.2d 633, 653-57 (1992). Moreover, "in *any* tort case a plaintiff must establish by clear and convincing evidence the basis for an award of punitive damages." *Id*. at 469 (emphasis in original).

There are no recent noteworthy punitive damage verdicts in Maryland, however, for a plaintiff to be eligible for receiving punitive damages, the plaintiff must file a specific claim for those damages which are supported by a statement of facts that would enable plaintiff to be considered for the award with the proper evidence in place. With respect to the issuance of punitive damages by juries, the Court of Appeals of Maryland held that juries should be instructed that they must find actual malice had been proved "by clear and convincing evidence," and not just a preponderance of the evidence. *Id*. at 460-69, 601 A.2d at 653-57. Notably, in the event punitive damages are awarded, Maryland does not impose a cap on punitive damages, meaning a punitive damages award is entirely decided by a judge or jury.

Does your state permit an expert to testify as to content of the FMCSRs or the applicability of the FMCSRs to a certain set of facts?

With respect to Maryland, there is no legal authority on point as to whether an expert can testify as to the content of the Federal Motor Carrier Safety Regulations ("FMCSRs") or the applicability of the FMCSRs to a certain

set of facts. However, in Maryland, whether an expert is permitted to testify is made on a case-by-case basis and "the admissibility of expert testimony is a matter largely within the discretion of the trial court[.]" Md. Rule 5-702. *Rochkind v. Stevenson*, 471 Md. 1, 236 A.3d 630 (2020). Maryland Courts adhere to the Daubert standard and "[a]ll of the *Daubert* factors are relevant to determining the reliability of expert testimony, yet no single factor is dispositive in the analysis; a trial court may apply some, all, or none of the factors depending on the particular expert testimony at issue." Md. Rule 5-702. *Rochkind v. Stevenson*, 471 Md. 1, 236 A.3d 630 (2020).

Thus, "a defense attorney in a trucking accident case [in Maryland] must remain vigilant throughout the course of litigation and seize every opportunity to limit unfair or improper testimony offered by plaintiff's experts. First, defense counsel should employ all methods of discovery available to define precisely the testimony that an expert ultimately will offer, the facts that form the foundation of those opinions, and the credentials that qualify the expert to offer the opinions." *R. Stickley, How to Bar Unfair Expert Testimony*; 55 No. 12 DRI For Def. 76. "After identifying the content of the proposed testimony of an expert, every effort should be made to exclude any irrelevant, unfairly prejudicial, or improper legal opinion evidence." *Id*.

Does your state consider a broker or shipper to be in a "joint venture" or similar agency relationship with a motor carrier for purposes of personal injury or wrongful death claims?

Generally, Maryland does not consider a broker or shipper to be in a "joint venture" with a motor carrier for purposes of personal injury or wrongful death claims. However, in certain situations, a broker or shipper may be found to have an agency relationship with a motor carrier for purposes of personal injury or wrongful death claims. An agency relationship "results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." Restatement (Second) of Agency, § 1(1) (1958). "An agency relationship may be established by written agreement or inference." *Patten v. Board of Liquor*,107 Md.App. 224, 238, 667 A.2d 940 (1995).

In *Schramm v. Foster,* 341 Supp. 2d 536, 543 (D. Md. 2004), a truck driver failed to yield at a stop sign seriously injuring a minor motorist. Parents of the minor motorist individually, and as guardians, sued the broker, who employed the carrier, who hired the driver, alleging that the broker was liable for the driver's negligence because an agency relationship existed between them. Plaintiffs and the broker cross-moved for summary judgment on issues of the broker's liability.

With regard to the agency claim, because no agreement existed establishing an agency relationship, the plaintiffs could only establish the relationship by inference, and to do so, they had to show that "1) the agent was subject to the principal's right of control; 2) the agent had a duty to primarily act for the benefit of the principal; and 3) the agent held the power to alter the legal relations of the principal." *Id*. However, the only evidence of an agency relationship was an agreement between the broker and the carrier that gave instructions on delivery, occasionally checked up on the carrier's progress, and required the implementation of certain safety measures. Ultimately, the Court determined the evidence supported a conclusion that the motor carrier was an independent contractor of the broker. The Court concluded that "it is not enough that [broker] retain general control over [driver's] participation in the transaction. To subject the principal to vicarious liability, the key element of control, or right to control must exist in respect to the very thing from which the injury arose. Thus, unless [broker] had control over [driver's] driving time and the condition in which he drove, it will not be vicariously liable for [driver's] negligence" and no agency relationship existed."

Provide your state's comparative/contributory/pure negligence rule.

Maryland is one of the very few jurisdictions which maintains that the "contributory negligence of a plaintiff will ordinarily bar his, her, or its recovery." *Bd. of Cnty. Comm'rs of Garrett Cnty., Md. v. Bell Atl.-Maryland, Inc.*, 346 Md. 160, 695 A.2d 171 (1997). Under this rule, the accident victim's failure to exercise due care that contributes even in the slightest way to the accident victim's injuries is an absolute bar to recovery. In other words, even if a jury were to believe a plaintiff was only 1% at fault for his or her injuries, plaintiff would be barred from recovery.

Provide your state's statute of limitations for personal injury and wrongful death claims.

Generally, the statute of limitations for personal injury in Maryland is three years from the date the cause of action accrued. Md. Code, Cts. & Jud. Proc. § 5-101. Wrongful death claims on the other hand must be filed within 3 years of the decedent's death. Md. Code. Ann, Cts. & Jud. Proc. § 3-904(g). However, there are exceptions to these general rules which should be carefully analyzed by a Maryland licensed attorney on a case-by-case basis.

In your state, who has the authority to file, negotiate, and settle a wrongful death claim and what must that person's relationship to the decedent be?

Only certain close family members of the deceased person have legal standing to bring a wrongful death claim under Maryland law. Persons with primary standing to bring a Maryland wrongful death claim include the deceased person's spouse, parent, or child of the deceased person. However, if no one in any of those groups survives the decedent, any person related to the deceased by blood or marriage and who was substantially dependent on the deceased may file the wrongful death claim. Md. Code. Ann, Cts. & Jud. Proc. § 3-904. These family members may negotiate and settle the wrongful death claim themselves or hire and utilize counsel to negotiate and settle the claim on their behalf, and with their express authority.

Is a plaintiff's failure to wear a seatbelt admissible at trial?

In Maryland, all individuals under the age of 16 need to use a seat belt or appropriate child seat. All individuals over the age of 16 need to use a seat belt. Md. Code Transportation § 22-412.3. However, failure to use a seat belt cannot be used as evidence of negligence, contributory negligence, evidence to limit liability of a tortfeasor or an insurer, and it cannot be used to diminish recovery for damages. Evidence of a failure to use a seat belt is inadmissible in a civil trial for property damage, personal injury, or death. However, none of the above rules are intended to limit the ability of an individual to bring a product liability action against a manufacturer over a seat belt. Md. Code Transportation § 22-412.3(h).

In your state, are there any limitations on damages recoverable for plaintiffs who do not have insurance coverage on the vehicle they were operating at the time of the accident? If so, describe the limitation.

Unfortunately, unlike many other jurisdictions, in Maryland, there are no limitations on damages recoverable for a plaintiff's failure to maintain insurance coverage on the vehicle he or she was operating at the time of the accident.

How does your state determine applicable law/choice of law questions in motor vehicle accident cases?

Maryland courts apply the law that is in effect in the jurisdiction where a motor vehicle accident takes place. Legally, this concept falls under a doctrine called "lex loci delicti" or "law of the place where the delict occurred." Under the "lex loci delicti principle, where the events giving rise to a tort action occur in more than one state, the

courts apply the law of the state where the injury, the last event required to constitute the tort, occurred." Restatement (First) of Conflicts of Law § 380. *Lab'y Corp. of Am. v. Hood*, 395 Md. 608, 911 A.2d 841 (2006). Thus, under the doctrine of "lex loci delicti," if a Maryland resident is involved in a motor vehicle accident involving an out-of-state driver within the state of Maryland, Maryland law will apply. However, there may be exceptions to this rule, and every choice of law question is unique and should be carefully analyzed by a Maryland licensed attorney on a case-by-case basis.