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COURT OF APPEALS

Attorney Grievance Commission v. Timur Z. Edib, Misc. No. 28, September Term, 2009, opinion filed 20 September 2010. Opinion by Harrell, J.

http://mdcourts.gov/opinions/coa/2010/28a09ag.pdf

ATTORNEY DISCIPLINE – REPRIMAND IS APPROPRIATE SANCTION FOR VIOLATIONS OF MRPC 1.16 (DECLINING OR TERMINATING REPRESENTATION), 1.4 (COMMUNICATION), AND 8.4(a) (MISCONDUCT), WHERE ATTORNEY FAILED TO SURRENDER RELEVANT DOCUMENTS REQUESTED BY FORMER CLIENT'S NEW ATTORNEY.

Facts: Timur Ziya Edib was charged by the Attorney Grievance Commission with professional misconduct arising from his representation of his former client, Ms. Gokperi Kismir, principally with regard to the sale of certain real property in Virginia. Bar Counsel charged Edib with violating Rule 1.4(a) and (b) (Communication), 1.16(d) (Declining or Terminating Representation), 1.5(a) (Fees), and 8.4(a) and (c) (Misconduct) of the Maryland Rules of Professional Conduct ("MRPC"). The Honorable Thomas L. Craven of the Circuit Court for Montgomery County concluded, after conducting an evidentiary hearing, that Respondent did not violate MRPC 1.5(a) or MRPC 8.4(c), but that he violated MRPC 1.16(d) and 1.4, which established also a MRPC 8.4(a) violation.

Ms. Kismir, a resident of Turkey, is the surviving sister of Mr. Gokeri Kismir ("Decedent"). Decedent resided in Alexandria, Virginia, dying there in May 2005. Ms. Kismir sought legal assistance in the United States by contacting the Turkish Consul, who referred her to Respondent, who spoke English and Turkish and specialized in immigration law and advising Turkish citizens with legal needs in or relating to the U.S. After some investigative work, Respondent determined that Ms. Kismir was Decedent's sole heir and that she held thereby marketable title to three pieces of real property in Northern Virginia (two condo apartments and a house) which passed to her, under Virginia law, outside the probate estate. The circumstances surrounding the sale of one of these properties and the conduct of Respondent after he was terminated as Kismir's counsel forms the basis for the allegations against Respondent.

Ms. Kismir also presented Respondent with a wide range of other issues – some involving the practice of law and others not

implicating the need for legal training necessarily. The amount of time and effort that would be required to resolve the matters concerning Decedent's assets (probate and non-probate), to advise and assist Ms. Kismir in managing and disposing of those assets, and in performing the other tasks she required, was entirely unknown at the inception of this relationship. Moreover, Ms. Kismir had very little money and was unable to afford a retainer fee for Respondent. In July 2006, Respondent and Ms. Kismir agreed upon two contracts intended to cover Respondent's services. The first contract set Respondent's fee for serving as administrator of the probate estate, which was not at issue. The second contract related to Respondent's services in representing Ms. Kismir concerning the other matters. This contract had a provision that established Respondent's compensation "based on the greater of either Three Hundred Dollars ($300.00) per hour for services rendered or a flat legal commission of fifteen percent (15%) of the gross value for all assets (personal or real property) received and handled through my office or escrow account for your benefit." Judge Craven found that Ms. Kismir understood the agreements and that the terms were fair and reasonable under the circumstances.

At some point in mid-Summer of 2006, Ms. Kismir decided she wanted to liquidate promptly the real estate. Edib retained a Mr. Bekir, a man who had known the Decedent and helped arrange Decedent's burial, as the real estate broker (Bekir's occupation) for these tasks. Respondent advised Ms. Kismir that she should sell the condo apartments for under $300,000, even though their fair market value was greater. This recommendation was intended to avoid a significant tax withholding that would have applied to the sale if the amount were greater than $300,000. In light of this, Ms. Kismir agreed to sell these properties for just under $300,000.

At a dinner meeting with Respondent and Bekir, Ms. Kismir announced her intention to sell the house to Bekir for below market value, but over $300,000. Ms. Kismir agreed to the below market sale in recognition of Bekir's assistance in burying Decedent and helping to sort out his affairs. Respondent protested her decision, to no avail. Two of Ms. Kismir's later complaints to the Commission arose from this transaction.

First, she claimed that Bekir waived orally his 6% brokerage fee because it was a direct sale between the two. At settlement, however, without objection from Respondent, the title company paid Bekir a 6% commission on the total sales price, amounting to approximately $23,000. Respondent's failure to object, and failure later to recover the commission from Bekir, is one source

of Ms. Kismir's dissatisfaction with Edib's representation of her. The second source of dissatisfaction is that the tax that was avoided on the sale of the two apartments was not avoided on the sale of the house. Respondent alleged that the tax withheld is recoverable from the IRS upon filing the appropriate tax return, but it appears that neither he nor Ms. Kismir took action to accomplish this (nor did Ms. Kismir's new attorney engaged after Edib's termination).

Respondent, pursuant to his retainer agreement with Kismir, received a total of $143,970 in fees disbursed from the proceeds of the sales of the three Virginia properties. In each transaction, Respondent received 15% of the sales price. Having to pay Respondent's commission, as well as Bekir's, on the house sale rankled Ms. Kismir.

In the Fall of 2006, after the settlement on the real estate, Decedent's probate estate remained open, consisting primarily of $140,000 in cash. Respondent did not distribute the net estate to Ms. Kismir without first paying Decedent's debts. After the debts were paid, the probate estate contained approximately $93,000 and Respondent was in a position to close the estate and make a final distribution. Ms. Kismir inquired of Respondent on several occasions regarding the status of the probate estate and complained about the disputed real estate commission on the house sale. Respondent told Ms. Kismir that he was unable to make significant distributions from the estate at that time and also failed to further pursue recovery of the real estate commission.

Frustrated with this state of affairs, Ms. Kismir fired Edib and retained another attorney in June 2007. Throughout the summer of 2007, by correspondence, email, and telephone, her new attorney demanded that Respondent provide copies of documents relating to the estate and to Respondent's representation of Ms. Kismir. Respondent was almost entirely unresponsive to and uncooperative with this request, stating that Ms. Kismir had all of the documents to which she was entitled. Judge Craven observed that a prior complaint filed by Edib against Kismir's new counsel with D.C. Bar Counsel may have poisoned the well and affected their contentious relationship.

Neither party took exception to Judge Craven's findings of fact. Both parties, however, took exceptions to his conclusions of law.

Held: Exceptions overruled. Reprimand is the appropriate sanction. Petitioner took a single exception to the conclusion

that Respondent did not violate MRPC 1.5. Respondent took exception to the conclusions that Respondent violated MPRC 1.16(d), 1.4, and 8.4(a). Petitioner argued first that while a 15% charge on services in connection with the sale of the house may have been reasonable initially, such became unreasonable in light of the fact that it was paid in addition to, rather than in lieu of, the 6% real estate broker's commission. Petitioner relied on language from prior cases that suggested an attorney's fee may become unreasonable "in light of changed facts and circumstances." *Attorney Griev. Comm'n v. Pennington*, 355 Md. 61, 74, 733 A.2d 1029, 1036 (1999) (citing *Attorney Griev. Comm'n v. Korotki*, 318 Md. 646, 664-65, 569 A.2d 1224, 1233 (1990)). The Court rejected Petitioner's argument after an analysis revealed that the cases were distinguishable and the language Petitioner relied on was used in a dissimilar context than here.

The Court also found Petitioner's second argument unpersuasive, that Respondent's fees were unreasonable because they were in excess of the "Fee Schedule for Executors and Administrators," promulgated by the Virginia Office of Commissioner Accounts. Petitioner argued that this schedule shed light on what a reasonable fee for an administrator of an estate is, pointing out that Respondent's fee for the house sale was in excess of this. The Court concluded that Respondent was not administering an estate with regard to his fee for the house sale, therefore, the Virginia Fee Schedule for Administrator's was inapplicable. Petitioner also incorrectly relied on a Maryland case in support of its claim that the Maryland Fee Schedules for Administrators should be persuasive to showing that a fee is unreasonable even when the attorney is not administering an estate. Finally, Petitioner asserted that any fees charged by Respondent were unreasonable because Respondent performed no "legal services." The Court concluded that MRPC 1.5 does not require that the attorney provide "legal services" per se and that prior case law even suggests that an attorney may charge for "legal services" though the services provided did not require that a lawyer perform them necessarily.

Respondent took exception to the conclusion that he violated MRPC 1.4 and 1.16(d). In Respondent's argument, he all but conceded that he violated MRPC 1.16(d). The Court concluded that Respondent had violated MRPC 1.16(d). Neither party took exception to Judge Craven's finding of fact that "Respondent was almost entirely unresponsive and uncooperative . . ." after he was terminated.

With regard to the MRPC 1.4 exception, Respondent argued essentially that MRPC 1.4 is inapplicable to his case. MRPC 1.4

is only implicated, he asserted, if an attorney fails to communicate with a "client." Respondent contended that, after Ms. Kismir terminated his representation, he could not have violated MRPC 1.4 for any subsequent conduct because the attorney-client relationship no longer existed at that time. The Court found this argument disingenuous based on the fact that Ms. Kismir remained Respondent's client with respect to the administration of the probate estate and because the Court previously has found an attorney in violation of MRPC 1.4 even after the attorney-client relationship was terminated.

Having overruled Petitioner's and Respondent's exceptions, the Court upheld the hearing judge's findings of fact and conclusions of law and determined that Respondent violated MRPC 1.4, 1.5, 1.16(d), and 8.4(a). In considering a sanction, the Court took note of the fact that none of the evidence suggested that Respondent harbored dishonest or deceitful motives in his representation of the client or his failure to surrender documents. Although there was reason to believe Respondent acted intentionally, rather than negligently, he had an unblemished record in the past, caused no actual harm to the client, and the nature of the ethical duty involved was relatively less concerning as to protecting the puclic from future harm. The Court concluded that a reprimand was a sufficient sanction to protect the public.

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DRD Pool Service, Inc. v. Thomas Freed, et al., No. 104, September Term 2009, filed September 22, 2010. Opinion by Greene, J.

http://mdcourts.gov/opinions/coa/2010/104a09.pdf

CONSTITUTIONAL LAW - SURVIVORSHIP CLAIMS – DAMAGES – CONSCIOUS PAIN AND SUFFERING

NONECONOMIC DAMAGES – STATUTORY CAP

Facts: In June 2006, Connor Freed, a five-year-old boy, went to the Crofton Country Club swimming pool with a family friend, Paul Carroll. Mr. Carroll removed Connor's life jacket so the child could go to the restroom. Connor left for the bathroom alone. Shortly thereafter, Connor was discovered face down in the pool. The autopsy report showed Connor died of drowning with no evidence of significant recent injury.

Thomas and Deborah Neagle Webber Freed, Connor's parents, filed a two-count complaint in the Circuit Court for Anne Arundel County. They alleged causes of action for survival and wrongful death. In their lawsuit, they named, inter alia, DRD Pool Service, Inc. ("DRD") as a defendant, alleging DRD's negligence in maintaining the pool.

In the survival action, Thomas Freed, as Personal Representative of Connor's Estate, sought damages for conscious pain and suffering that Connor experienced prior to drowning. Both parties called experts to testify on the issue of consciousness prior to Connor's drowning. DRD filed a motion for summary judgment based on the lack of eye witness testimony, arguing expert testimony was not alone sufficient to give rise to a reasonable inference of conscious pain and suffering. The Circuit Court agreed, and granted the motion for summary judgement. The Court found that the Freeds did not show that the decedent was conscious of the pain and suffering, and therefore the issue could not be submitted to the jury.

The remaining wrongful death claim proceeded to trial and was submitted to the jury. The jury found DRD negligent and awarded the Freeds $4,006,442. The award was reduced to $1,002,500 by the trial court, pursuant to the statutory cap on non-economic damages, § 11-108 of the Maryland Courts and Judicial Proceedings Article("Cap"). The Freeds filed a motion to alter or amend the judgment challenging the constitutionality of the Cap. The Circuit Court denied this motion, relying on this Court's decision in *Murphy v. Edmonds*, 325 Md. 342, 601 A.2d 102 (1992), which upheld

the Cap against the same constitutional challenges. The Freeds filed a timely appeal to the Court of Special Appeals with regard to the grant of summary judgment on the survivorship claim and the denial of the motion to alter or amend the judgment on the wrongful death claim.

The Court of Special Appeals reversed the Circuit Court's grant of summary judgment. *Freed v. DRD*, 186 Md. App. 477, 974 A.2d 978 (2009). The court held that the evidence presented in this case was sufficient for the jury to infer that Connor experienced conscious pain and suffering. The Court of Special Appeals affirmed the denial of the motion to alter or amend the judgment.

Held: Court of Special Appeals affirmed.

The Circuit Court erred in granting the motion for summary judgment on the survivorship claim. The Court held that the autopsy report and expert testimony may be sufficient evidence from which to infer conscious pain and suffering in drowning cases and that eyewitness testimony is not essential. The facts in this case support a reasonable inference that Connor was conscious and suffered while drowning. Thus, the issue of conscious pain and suffering should have been submitted to the jury and therefore Circuit Court erred in granting summary judgment.

The Circuit Court did not err in denying the motion to alter or amend the judgment. This Court followed *stare decisis,* and held the cap on non-economic damages was constitutional. The Court previously upheld the Cap in *Murphy v. Edmonds*, 325 Md. 342, 601 A.2d 102 (1992), and *Oaks v. Connors*, 339 Md. 24, 600 A.2d 423 (1995). The Court held there was no justification to disregard *stare decisis* in this case. The Court also addressed the Freed's claims, evaluating the Cap using the rational basis test. The Court reiterated that the Cap survives challenges based on equal protection and infringement of the important rights to a jury trial and access to the courts.

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William Edward Dillard v. State, No. 50, September Term 2009, filed August 25, 2010. Opinion by Greene, J.

http://mdcourts.gov/opinions/coa/2010/50a09.pdf

CRIMINAL LAW AND PROCEDURE – JURY TRIALS – RIGHT TO AN IMPARTIAL JURY

Facts: In late 2006, officers arrested William Edward Dillard after police observed suspected drug transactions at a residence in Charles County. Police executed a search warrant at that residence, 3125 Lewis Place; Dillard was arrested and charged with possession of cocaine, possession of marijuana, possession with intent to distribute cocaine, conspiracy to distribute cocaine, possession of drug paraphernalia and possession of a firearm in relation to drug trafficking.

During the trial, the State called Detective Smith as the primary witness and Sergeant Robert Kiesel as a drug expert. After their testimony, the court recessed for lunch. During the recess, two jurors walked by the officers, patted Detective Smith on the back and said "good job." Detective Smith did not respond. Defense counsel moved for a mistral on the grounds of juror misconduct. As an alternative, Defense counsel moved for at least one of the jurors to be removed and replaced with an alternate. The motions were denied and Dillard was convicted on three counts.

Dillard appealed to the Court of Special Appeals which affirmed the trial court's judgment. The intermediate court held that the trial court correctly denied Dillard's motion for a mistrial. The court further held that Dillard did not preserve the complaint that the trial judge did not conduct a *voir dire* examination of the jurors because he failed to request such an examination. The intermediate court held that the jurors did not engage in any misconduct in talking to the officers and the conduct was not prejudicial to the case. The Court of Appeals granted Dillard's petition for writ of certiorari to consider whether prejudice should be presumed based on the specific juror conduct in this case.

Held: Court of Special Appeals reversed, conviction vacated and case remanded for a new trial. The Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights require an impartial jury. Contact between witnesses and jurors is generally considered improper and raises concerns about the fundamental fairness of a jury trial. In cases where the conduct is "excessive and egregious," a presumption of prejudice arises and the burden shifts to the state to prove the

contact was harmless. In the instant case, the Court could not determine from the record whether the contact was sufficiently egregious to create a presumption of prejudice. The Court held that a *voir dire* examination was necessary to determine this issue. The failure to conduct an examination was an abuse of discretion by the trial court judge. The Court noted that while some juror misconduct may be rehabilitated through a curative instruction, this remedy is limited to where the judge is already aware of the extent of the possible prejudice. The judge in this case was unaware of the possible bias because no inquiry was conducted. Because the trial court judge did not abide by its affirmative obligation to inquire into possible prejudice, denial of the motion for a mistrial was an abuse of discretion.

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State of Maryland v. Brian Gerard Kanavy, Shadi Sabbagh, Dennis Harding, Mark Richard Sainato, and Jason Willie Robinson , No. 129, September Term, 2009, Filed September 21, 2010, Opinion by Murphy, J.

http://mdcourts.gov/opinions/coa/2010/129a09.pdf

CRIMINAL LAW - RECKLESS ENDANGERMENT - CRIMINAL PROCEDURE - LEGAL SUFFICIENCY OF INDICTMENT CHARGING RECKLESS ENDANGERMENT: An indictment charging that the defendant (1) owed a legal duty to obtain emergency medical care for the victim, and (2) deliberately disregarded that duty, is legally sufficient to charge the offense of reckless endangerment. The term "conduct" in § 3-204(a)(1) of the Criminal Law Article includes both acts and omissions.

Facts: All of the Respondents were charged with reckless endangerment by way of indictment which read as follows:

> STATE OF MARYLAND, CARROLL COUNTY, TO WIT:
> The Grand Jurors of the State of Maryland, for the body
> of Carroll County, do on their oaths and affirmations present
> that [the Respondent] late of said County, on or about January
> 23, 2007 at 999 Crouse Mill Road, Keymar, Carroll County,
> Maryland, did recklessly engage in conduct, to wit: did fail to
> contact emergency services (9-1-1) in a timely manner that
> created a substantial risk of death and serious physical
> injury to Isaiah Simmons, III, while in Defendant's care and
> custody and a duty to do so existed, in violation of the
> Criminal Law Article, Section 3-204, A-1, contrary to the form
> of the act of the assembly in such case made and provided and
> against the peace, government and dignity of the state.

(Emphasis supplied).

Held: Judgment Reversed. The Circuit Court dismissed the indictments on the ground that the reckless endangerment statute does not proscribe failures to act. The Court of Special Appeals affirmed that decision. The Court of Appeals reversed the judgment of the Court of Special Appeals and directed that the case be remanded to the Circuit Court for a trial.

The Court of Appeals held that the indictment at issue was legally sufficient to charge the crime of reckless endangerment because the term "conduct" in § 3-204(a)(1) of the Criminal Law Article includes both acts and omissions. To convict a Respondent of the crime charged in the indictment, the State must prove beyond a reasonable doubt that (1) the Respondent owed a duty to obtain emergency medical care for the deceased, (2) the Respondent was aware of his obligation to perform that duty, (3) the Respondent knew that his failure to perform that duty would create a substantial risk of death or serious physical injury to the deceased, (4) under the circumstances, a reasonable employee of the Department of Juvenile Services in Respondent's position would not have disregarded his or her duty to (in the words of the indictments) "contact emergency services (9-1-1) in a timely manner," and (5) the Respondent consciously disregarded his duty.

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Charles R. Keys, Jr. v. State of Maryland, No. 1716, September, 2009. Opinion filed on September 20, 2010 by Graeff, J.

http://mdcourts.gov/opinions/cosa/2010/1716s09.pdf

CRIMINAL LAW = RESTITUTION - TIME FOR FILING APPLICATION FOR LEAVE TO APPEAL - 8-204(b)(2)(A) - ENTRY OF JUDGMENT - INDEXING AND RECORDING OF RESTITUTION AS CIVIL JUDGMENT - C.P. § 11-609(a)

Facts: Between November 2005 and February 2007, appellant engaged in a felony theft scheme, receiving goods with a value over $500 by means of stolen and misrepresented credit cards issued to numerous individuals. He engaged in what the State characterized as an account take over scheme, whereby the victim's credit cards themselves were still in the victim's possession but their credit card numbers were used by some person unknown to them.

Appellant pled guilty to seven counts of theft and identity fraud. As a part of the plea agreement, the court ordered that restitution be paid in an "amount to be determined within 60 days either by agreement or if not agreed to, then either party can request a restitution hearing before the Court." When the parties were unable to agree on restitution, the court held a restitution hearing and ordered appellant to pay restitution, as a condition of his probation and as a term of his sentence, to multiple victims in the amount of $101,993.42. This order was entered on July 20, 2009, and on July 24, 2009, the court recorded civil judgments in favor of the individual victims. On August 24, 2009, appellant filed a "Notice of Appeal and Alternatively, Application for Leave to Appeal," challenging the order of restitution.

Held: Appeal dismissed. Pursuant to Md. Rule 8-204(b)(2)(A), an application for leave to appeal "shall be filed within 30 days after entry of the judgment or order from which the appeal is sought." If this time requirement is not met, the appellate court acquires no jurisdiction to resolve the appeal.

Here, the judgment from which the appeal is sought is the court's order of restitution, which was entered on July 20, 2009. Appellant's application for leave to appeal was not filed, however, until August 24, 2009, which was more than 30 days after entry of the order of restitution. The record reflects that, on July 24, 2009, pursuant to Md. Code (2008 Repl. Vol.), § 11-609(a) of the Criminal Procedure Article, the judgment of restitution was recorded and indexed as civil judgments in favor of individual victims. The civil judgments, however, are separate from the criminal judgment of restitution, and the indexing and recording of the civil judgments did not extend the time during which appellant

could appeal the order of restitution. Appellant's application for leave to appeal was not filed timely.

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Sean Anthony Dove v. State of Maryland, No. 118, September Term 2009, opinion filed on September 21, 2010 by Greene, J.

http://mdcourts.gov/opinions/coa/2010/118a09.pdf

CRIMINAL LAW AND PROCEDURE – SENTENCING – HARMLESS ERROR – ALL EVIDENCE THAT THE STATE INTENDS TO OFFER IN SUPPORT OF SENTENCING A REPEAT OFFENDER UNDER MD. CODE (2002), § 5-608(C) OF THE CRIMINAL LAW ARTICLE MUST BE DISCLOSED TO THE DEFENDANT PRIOR TO THE SENTENCING HEARING.

Facts: Dove was charged in the Circuit Court for Baltimore County with one count of possession of heroin and one count of possession with intent to distribute heroin. A jury returned verdicts of guilty on both counts. At sentencing, the State sought an enhanced penalty of 25 years' imprisonment without parole pursuant to § 5-608(c). The State asserted that Dove's conviction in the present case was his third qualifying conviction under the statute, or "third strike," and presented evidence at the sentencing hearing to substantiate Dove's two prior qualifying convictions.

The State's evidence at the sentencing hearing consisted of the certified records of the alleged prior convictions; the expert testimony of a detective, who was qualified as an expert in the identification of known inked fingerprints; and the testimony of an employee of the Maryland Division of Correction. Dove specifically objected to the admission of a fingerprint card used to link his identity to the record of a prior conviction when the State failed to provide notice that the card would be used at the sentencing hearing. Dove also objected to the detective's references to the fingerprint card in his testimony because the State had not disclosed the cards in discovery. Dove admitted that he received notice of the state's intent to call the particular detective as a witness prior to the sentencing hearing. Although the State properly notified Dove that he qualified as a repeat offender subject to an enhanced penalty, the State did not disclose to Dove or his attorney the State's intention to rely on the fingerprint cards.

Through the detective's testimony, the State presented two certified records of prior convictions, as well as two fingerprint cards, to prove that Dove had two prior convictions for qualifying offenses under § 5-608(c). The State presented the fingerprint card at issue in the present case and asserted that the Baltimore City Police collected the fingerprints from an individual arrested on June 7, 2000. The State asserted that the fingerprint card in question was associated with case number 200202007 from the

criminal records of the Baltimore City Circuit Court, in which an individual identified as Sean Anthony Dove was found guilty of possession with intent to distribute heroin on March 19, 2001, receiving a sentence of eight years. The detective testified that he took inked impressions from Dove while he was in the lock-up and compared the inked impression to those on the fingerprint card in question. According to the detective, the fingerprints were those of the same person.

The Detective also testified about a second conviction and another set of fingerprints collected during a different arrest on August 31, 2000, which also belonged to Dove. The State asserted that the fingerprint card in question was associated with a March 19, 2001 conviction for possession with intent to distribute cocaine. Near the conclusion of the detective's direct testimony, the sentencing judge admitted the fingerprint cards, from both arrests, into evidence.

Held: Reversed and Remanded. When the State introduced a fingerprint card to establish the defendant's identity in a prior conviction to prove that he was a repeat offender subject to an enhanced penalty pursuant to Md. Code (2002), § 5-608(c) of the Criminal Law Article, but failed to disclose the card to the defendant prior to the sentencing hearing as required by Rule 4-342(d), the error was not harmless when the sentencing judge relied on the fingerprint card in imposing an enhanced penalty. Further, the fingerprint card was not cumulative evidence because the information on the fingerprint card helped to establish the nexus between the defendant and the certified record of the prior conviction.

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COURT OF SPECIAL APPEALS

Baltimore Street Parking Company, LLC v. Mayor & City Council of Baltimore, Nos. 279 and 667, September Term 2009. Opinion filed September 15, 2010 by Eyler, James, J.

http://mdcourts.gov/opinions/cosa/2010/279s09.pdf

ADMINISTRATIVE LAW - COMMISSION FOR HISTORICAL AND ARCHITECTURAL PRESERVATION - PROPERTY OWNER ENTITLED TO JUDICIAL REVIEW OF DECISION BY COMMISSION TO PLACE PROPERTY ON SPECIAL LIST - COMMISSION DID NOT VIOLATE PROPERTY OWNER'S DUE PROCESS RIGHTS.

Facts: The General Assembly authorized the City to enact laws for historic and landmark preservation. Md. Code, Art. 66B, § 2.12. Pursuant to that authority, the City enacted Article 6, subtitle 3, of the City Code, authorizing the Commission to designate Preservation Districts and place properties on Landmark Lists or Special Lists. The designations carry with them restrictions on development. The Commission placed Baltimore Street Parking's property on the Special List, and Baltimore Street Parking sought judicial review.

Baltimore Street Parking contended it was entitled to judicial review and further contended it was denied due process because it was not afforded adequate notice and an opportunity to be heard prior to the Commission's decision. The Circuit Court for Baltimore City affirmed the Commission's decision.

Held: The Court of Special Appeals affirmed. The Court held that Baltimore Street Parking was entitled to judicial review, even though no statute provided for such review. The Court further held that Baltimore Street Parking had sufficient notice of all proceedings and was not deprived of due process.

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Daniel Hubert Ross v. Chandrima Chakrabarti, et al., No. 6, Sept. Term, 2009. Opinion filed on September 14, 2010 by Kenney, J. (retired, specially assigned).

http://mdcourts.gov/opinions/cosa/2010/6s09.pdf

ATTORNEYS - UNAUTHORIZED PRACTICE OF LAW - POWER OF ATTORNEY - LIMITED AUTHORITY GIVEN TO "ATTORNEY IN FACT"

Facts: Appellant sued an insurance company and two of its employees alleging that they "unconstitutionally abridged [his] freedom of expression and association" by directly settling an automobile collision claim with an individual whom appellant, although not admitted to the Bar, was attempting to represent as an attorney-in-fact under a power of attorney. The complaint was dismissed for failure to state a claim upon which relief could be granted.

On appeal, appellant argued the circuit court erred in dismissing his complaint because the longstanding prohibition against the practice of law by a "non-barred" person such as himself is not in the public interest.

Held: Affirmed. Appellant did not have the right to represent his friend as an attorney-in-fact under the power of attorney because that document did not permit appellant to perform legal services that amount to the unauthorized practice of law. By its own terms, the power of attorney gave appellant authority to act on behalf of his friend only "to the extent that [the friend was] permitted by law to act through an agent." Under Md. Code, § 10-601(a) of the Business Occupations & Professions Article and Md. Rule 2-131(a), an individual may not file a lawsuit or appear in court through an agent who is not authorized to practice law in Maryland. Because practicing law is defined to include "giving legal advice," "representing another person before a unit of the state government," "preparing . . . any . . . document that is filed in a court or affects a case that is or may be filed in a court," and "giving advice about a case that is or may be filed in a court[,]" BOP § 10-101(h), the power of attorney did not – and could not – convey to appellant the right to give legal advice, to represent his friend in court, to prevent appellees from settling directly with his friend, or to pursue a claim that is personal to his friend. This prohibition against unauthorized practice of law protects "the public from being preyed upon by those not competent to practice law – from incompetent, unethical, or irresponsible representation," *In re Application of R.G.S.*, 316 Md. 626, 638 (1988), and allows courts to rely on an advocate's responsibility

to act ethically and with the heightened responsibilities that attend admission to the Bar.

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Central Truck Center, Inc., et. al. v. Central GMC, Inc., et. al., No. 1780, September Term, 2008. Filed on September 7, 2010. Opinion by Sharer, J.

http://mdcourts.gov/opinions/cosa/2010/1780s08.pdf

CIVIL LAW - MOTION FOR SUMMARY JUDGMENT - CONTRACTS - INTEGRATION CLAUSE

Facts: The parties entered into an asset and real estate purchase agreement ("Agreement") whereby appellee, Central GMC, agreed to sell truck dealership assets and associated real estate to appellant, Central Truck. In its complaint, Central GMC alleged that following the May 1, 2006 closing of the sale, Central Truck materially breached the terms of the Agreement by failing to pay the full settlement amount, leading to a $44,700 shortfall of the purchase price, and by failing to fulfill certain other requirements set forth in the Agreement.

Ultimately, by way of its fourth amended counterclaim, Central Truck alleged causes of action for breach of contract, fraud, concealment, and negligent misrepresentation by Central GMC, based, in part, on its claim that following the purchase of the truck dealership, its income during the summer months of 2006 was considerably less than anticipated, given Central GMC's sales history, upon which Central Truck had relied in negotiating a price for the purchase of the dealership. The shortfall, Central Truck contended, was due to an inaccuracy in Central GMC's financial statements, resulting in large part from the cancellation of a contract between Central GMC and the District of Columbia Public Schools ("DCPS"), by which Central GMC had contracted to provide parts, service, and repairs to DC school buses. Central Truck averred that Central GMC had overbilled DCPS and that the overbilled figures enhanced Central GMC's gross receipts, thus inflating the value of the truck dealership.

On April 18, 2008, Central GMC responded to Central Truck's fourth amended counterclaim by filing its second amended motion for summary judgment, in which it argued that the Agreement constituted a complete integration of the terms of the contract and did not provide for any representations or stipulations to Central Truck as to a continuation of Central GMC's past income. Central GMC further asserted that the Agreement explicitly notified Central Truck that DCPS had disputed Central GMC's claim for collection of accounts receivable on the contract that had expired in September 2005, well before the January 2006 effective date of the Agreement. Therefore, it argued, Central Truck could not claim that it had an expectation of income from DCPS on the

expired contract, and Central GMC was entitled to summary judgment as to the fraud, concealment, and negligent misrepresentation claims, as no material facts were in dispute.

On August 29, 2008, the Circuit Court for Prince George's County, having previously resolved all other outstanding issues, ruled on the fraud, concealment, and negligent misrepresentation issues in Central GMC's motion for summary judgment. The court found that the Agreement's integration clause, which set forth all promises and understandings and superseded any prior agreement, understandings, or inducements, precluded Central Truck's claims that it reasonably could have relied on Central GMC's financial statements in setting a price for the purchase of the truck dealership, in that Central Truck failed to make those financial statements a part of the agreement. Moreover, the circuit court found no evidence that Central GMC had made any false representations to Central Truck or intended to defraud Central Truck. The court thus granted Central GMC's motion for summary judgment on those claims. The circuit court additionally ruled that, based on the disputes in the complaints and counterclaims, Central GMC owed Central Truck damages in the amount of $1,197.11.

Following the September 18, 2008 entry of judgment, Central GMC filed a motion to alter or amend the judgment, alleging that the circuit court's calculation of damages failed to take into account monies it had already paid to Central Truck. The court denied the motion.

Central Truck noted a timely appeal to the Court of Special Appeals from the grant of Central GMC's motion for summary judgment, and Central GMC noted a timely cross-appeal from the judgment and from the circuit court's denial of its motion to alter or amend the judgment.

Held: Affirmed. The Court of Special Appeals held that the circuit court correctly granted summary judgment to Central GMC on Central Truck's claims of fraud, concealment, and negligent misrepresentation, as Central Truck failed to make a sufficient showing of essential elements of its fraud-based claims. Specifically, Central Truck failed to show that Central GMC made any false representations, that Central Truck justifiably relied on any such representation, or that it suffered compensable injury resulting from a representation.

Moreover, the Agreement contained an integration clause, which explicitly superseded all prior and contemporaneous agreements, understandings, inducements, or conditions. The

Agreement itself was lengthy and detailed, no doubt the product of considerable negotiations and bargaining by sophisticated business people represented by experienced advisors. As such, Central Truck's alleged reliance on extra-contractual documents, *i.e.*, Central GMC's financial statements, was unreasonable. Were the documents as important to Central Truck's decision making process as it claimed, it had every reason to seek their incorporation into the Agreement, but it chose not to do so. The Court of Special Appeals adopted the rationale of *One-O-One Enterprises, Inc. v. Caruso*, 848 F.2d 1243 (D.C. Cir. 1988), which reasoned that:

> [o]n a matter of such large significance to the parties' bargain, silence in a final agreement containing an integration clause–in the face of prior explicit representations–must be deemed an abandonment or excision of those earlier representations.

Id. at 1287. The Court of Special Appeals did not hold that an integration clause bars a claim of fraud based on pre-contractual representation in every instance, but the integration clause in the Agreement, together with the evidence of the unreasonableness of Central Truck's reliance, defeated the fraud-based claims asserted by Central Truck in its counterclaim.

The Court of Special Appeals also held that Central GMC's contention that the circuit court incorrectly calculated damages in favor of Central Truck was not supported by the record and that the circuit court did not abuse its discretion in denying Central GMC's motion to alter or amend the judgment.

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Boland v. Boland, No. 2796, September Term, 2008, filed September 15, 2010. Opinion by Eyler, Deborah S., J.

http://mdcourts.gov/opinions/cosa/2010/2796s08.pdf

CORPORATIONS – "DEMAND REFUSED" SHAREHOLDER'S DERIVATIVE ACTION – SPECIAL LITIGATION COMMITTEE – BUSINESS JUDGMENT RULE VS. INDEPENDENT JUDGMENT TEST – *BENDER V. SCHWARTZ*, 172 MD. APP. 648 (2007) – ENTIRE FAIRNESS TEST – *LERNER V. LERNER CORP.*, 132 MD. APP. 32 (2000).

Facts: John and Kevin Boland, shareholders in Boland Trane Associates, Inc., and Boland Trane Services, Inc., two closely held related corporations, brought a derivative action in the Circuit Court for Montgomery County against the corporations and four out of the five directors alleging, among other things, that the corporations improperly approved stock sales to interested directors and the son of an interested director. The corporations' boards appointed two outsiders as directors to act as a special litigation committee ("SLC") to determine whether the corporations should pursue the derivative claims. The SLC retained independent counsel to assist it. After a five-month investigation, the SLC issued a report setting forth its findings and recommending that the corporations not pursue the claims. On the basis of the SLC report, the corporations and directors sought dismissal of, or summary judgment on, the derivative claims. The circuit court granted summary judgment in favor of the defendants.

On appeal, the shareholder plaintiffs argued that the circuit court erred in applying the business judgment rule instead of applying its own independent judgment in ruling on the motions and that the SLC should have applied an "entire fairness test" when it investigated and made recommendations about the factual bases for the derivative claim.

Held: Affirmed. In a "demand refused" shareholder's derivative action, when a special litigation committee has investigated and recommended against the corporation pursuing the derivative claims, under Maryland law, the circuit court should apply the business judgment rule in deciding whether to terminate the derivative claims. The "independent judgment test," a product of Delaware law, is not consistent with Maryland's statutory business judgment rule, with the nature of a demand refused action, or with the analysis of the Court of Special Appeals in *Bender v. Schwartz*, 172 Md. App. 648 (2007).

In addition, in assessing the reasonableness of the SLC's

investigation and recommendations, the circuit court acted properly in not applying the "entire fairness test." That test is implicated in actions involving self-dealing transactions that affect the ownership status of a minority shareholder – such as a transaction eliminating or changing a minority shareholder's ownership interest, a self-dealing merger transaction, or a cash-out merger between parent and subsidiary that eliminates minority shareholders. *See Lerner v. Lerner Corp*, 132 Md. App. 32 (2000). This is not such a case; indeed, the stock sales in question had no meaningful impact on the percentages of stock owned by the shareholders in the corporations.

Boland v. Boland, No. 2796, September Term, 2008, filed September 15, 2010. Opinion by Eyler, Deborah S., J.

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George John Bereska v. State of Maryland, No. 742, September Term, 2009. Opinion by Raker, J., filed on September 17, 2010.

http://mdcourts.gov/opinions/cosa/2010/742s09.pdf

COURTS AND JUDICIAL PROCEEDINGS = JUDGMENTS – AMENDMENT, CORRECTION AND REVIEW IN THE SAME COURT – AFTER THE TERM

APPEAL AND ERROR – REVERSAL – JURISDICTIONAL DEFECTS

COURTS – ACTS AND PROCEEDINGS WITHOUT JURISDICTION

Facts: This case addresses the jurisdiction of the circuit court to modify its judgments.

Appellant entered a guilty plea on March 14, 1996, to the offense of third-degree sexual assault, based on conduct in June and July of 1995. In October, 1995, the General Assembly had amended the Maryland Code to preclude the grant of probation before judgment ("PBJ") for the offense of third-degree sexual assault. Appellant nonetheless filed a timely motion to modify his sentence, requesting PBJ. The court, also unaware of the change in the law, held this matter sub curia until 2004.

Pursuant to an agreement between appellant and the State, on August 9, 2004, the court permitted appellant to withdraw his 1995 guilty plea, permitted the State to amend the charging document, and permitted appellant to enter a guilty plea to another charge which was not statutorily barred for PBJ. The State had consistently opposed PBJ, but agreed in 2004 not to oppose PBJ on the condition that appellant waive his right to seek expungement of the court record. Appellant did so.

In November of 2007, appellant filed a motion, arguing that his 2004 guilty plea was affected by mistake and irregularity, and in the alternative, that he was entitled to coram nobis relief. Appellant claimed the 1995 statutory amendment eliminating the possibility of PBJ for third-degree sexual offenses violated his rights under the Ex Post Facto clauses of the United States Constitution and the Maryland Declaration of Rights. His coram nobis petition alleged that he had received ineffective assistance of counsel, in that his attorney had not perceived this ex post facto issue.

The court denied appellant's 2007 motion. Appellant filed a substantially similar motion in 2009, and the court again denied the motion. Appellant noted an appeal.

Before the Court of Special Appeals, appellant argued that the ex post facto law doctrine precludes any retroactive effect of the amendment eliminating the option of PBJ for his offense, and that the expungement waiver in the new plea agreement was invalid, because the plea to a lesser count was not actually necessary to obtain PBJ, in light of the ex post facto law clauses of the Maryland and federal constitutions. The only relief appellant sought was that his right to seek expungement of his court record should be restored.

After briefing, oral argument, and supplemental briefing, the Court perceived the question presented to be whether the circuit court had jurisdiction in 2004 to permit appellant to withdraw his 1995 guilty plea.

Held: The Court held that the circuit court was without jurisdiction to conduct the 2004 plea exchange. The Court explained that historically the jurisdiction of a court over its judgment terminated with the term of court in which the judgment was entered, but that this had been modified by the Maryland rules. The Maryland rules now determine the court's authority over a previously entered judgment.

Appellant's 1996 motion, which the Court held sub curia and acted upon in 2004, was a motion for modification under Rule 4-345. The court lacked any authority to allow appellant to withdraw his plea under Rule 4-345, which concerns the revision of sentences solely.

The Rule allowing the withdrawal of a guilty plea is Rule 4-242(g). Appellant made no such motion, but instead made only a motion under Rule 4-345. In addition, appellant's motion was not filed within ten days of his guilty plea as required in Rule 4-242(g), and none of the three bases for allowing the withdrawal of a plea set forth in the Rule was implicated in appellant's case.

The Court further noted that appellant's mistake, irregularity, and coram nobis arguments were meritless. The failure of defense counsel to argue the ex post facto theory cannot amount to mistake and irregularity under Maryland precedents, and counsel cannot have been ineffective for failing to notice the argument at a void proceeding.

Because the circuit court had no jurisdiction to conduct the 2004 plea exchange, the Court of Special Appeals restored the case to its posture on March 14, 1996, the day of the original acceptance of appellant's guilty plea. The Court remanded the

case with directions to vacate appellant's second plea, to reinstate appellant's initial, 1996 guilty plea for third-degree sexual assault, and to reinstate appellant's original sentence.

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Perry Simms a/k/a Perry Sims v. State of Maryland, *No. 1509, September Term, 2008*. Opinion by Hollander, J. was filed on September 3, 2010.

http://mdcourts.gov/opinions/cosa/2010/1509s08.pdf

CRIMINAL LAW - ALIBI - ALIBI NOTICE - MARYLAND RULE 4-263 - DISCOVERY

Facts: Perry Simms, a/k/a Perry Sims, appellant, was convicted by a jury in the Circuit Court for Baltimore City of manslaughter and two handgun offenses. The crime occurred on June 30, 2007, at about 10:00 p.m. At trial, the court permitted the State to introduce a redacted version of appellant's alibi notice, filed six months before trial, even though, at trial, appellant neither testified nor presented a defense case. As redacted, the alibi notice identified appellant's father as an alibi witness.

Detective Juan Diaz testified at trial that appellant was arrested on July 13, 2007, waived his rights, and made a recorded statement, which was played for the jury. In that statement, appellant claimed that, on the date of the crime, he was at his mother's home all day until he "went up Douglas projects" at about 11:00 p.m. Appellant also claimed that, between 9:00 p.m. and 11:00 p.m., his mother blew out and braided his hair, and that his younger and older brothers were also at the house. Appellant denied that he shot anyone.

The State sought to play three recorded telephone conversations involving appellant, which took place during appellant's pretrial incarceration. In connection with the ruling on the admissibility of the recorded telephone conversations, the court also discussed the defense's alibi notice.

The prosecutor advised the court that the defense had disclosed a list of "about 10" alibi witnesses, and that, in one of the recorded telephone conversations, appellant referred to about twenty people who saw him at a party. Referring to the alibi notice, the court asked: "Are you going to put that into evidence?" The court then said: "[I]f the alibi statement sounds to be probative, she's [i.e., defense counsel] the agent of the defendant, so it's admissible against him . . . ." The court also said to the prosecutor: "[Y]ou should put the filing into evidence so that you can argue it to the jury." Defense counsel objected, stating: "Your Honor, the Defense has no burden to put any defense on. And the State bringing up the

Defense's attorney filing a notice of alibi witnesses, shifts the burden that my client then has to rebut." The prosecutor stated: "The relevance for the State, whether she puts it in or not, is consciousness of guilt." In addition, the State claimed that it was "a false alibi," explaining:

> On the alibi, and this is during the time that the defendant is on the telephone calls, he's speaking again to his mother, and then one time also to his father. And in one conversation with his mother, he's discussing with his mother that they have alibi witnesses, and that the defendant was at his mother's house because the father and the little brother went out of town . . . . That's why he came over for his mother's birthday party.
>
> The following ensued:
>
> THE COURT: How do you show [the alibi notice is] false and that he knows it's false?
>
> [PROSECUTOR]: By his response to the statement, by the fact that he speaks to his father, by the fact that they say he's in Myrtle Beach on the phone call.[]
>
> * * *
>
> THE COURT: Okay, you're telling me there's a phone call in which the defendant says father and brother were out of town?
>
> [PROSECUTOR]: Town, right. He's talking to the mother.
>
> THE COURT: And he says they were out of town, and then he lists those two as alibi witnesses. * * * – why it matters is your proffer that there is a subsequent phone call in which he says where he's going to use two people as alibi witnesses, father and brother I think you said. And did in fact list those two people he knows were not there. Based on that proffer, if I understood you correctly, that there is a subsequent phone conversation in which he says in effect we'll use father and brother I think that subsequently helps to pull this one in. * * * So let me hear from [appellant's counsel]. What do you want to tell us?
>
> * * *
>
> [APPELLANT'S COUNSEL]: * * * The speaker who's not

> institutionalized [i.e., appellant's mother] says "because you came home, because you're staying with your father, and your father then went out of town, your father and your little brother. That's why you was over here with me." * * * But where it indicates that the father and the little brother were out of town. I mean where's the impeachment portion of that? . . . .
>
> THE COURT: Okay. I hear you, but I think it's enough to let it in.

The telephone recording that the State played first was of a conversation between appellant and his mother on July 31, 2007. The following excerpt is relevant (emphasis added):

> [APPELLANT]: . . . Ma' [sic] I just need everybody, Ma', that you can get Ma', (unintelligible)
>
> [APPELLANT'S MOTHER]: Uh huh.
>
> [APPELLANT]: And vouch for me and say the same shit, see what I'm saying?
>
> [APPELLANT'S MOTHER]: Yeah I know.
>
> [APPELLANT]: I told them that you know my hair was all over my head, you done my hair.
>
> [APPELLANT'S MOTHER]: Uh huh.
>
> [APPELLANT]: You see what I'm saying from at um what – you start doing my hair like seven o'clock but the party started at six. I been there ever since that morning. You feel me?
>
> [APPELLANT'S MOTHER]: Yeah.
>
> [APPELLANT]: (inaudible) you already know.
>
> [APPELLANT'S MOTHER]: Because you came home, because *you was staying with your father and your father and them went out of town* – your father and your little brother – *that [sic] why you was over here with me.*
>
> [APPELLANT]: Okay. Right.
>
> [APPELLANT'S MOTHER]: On my birthday that's the way it

went.

[APPELLANT]: Uh huh. That's what I'm saying right, and all, and everybody Aunt Lisa everybody you see what I'm saying?

[APPELLANT'S MOTHER]: Uh huh.

[APPELLANT]: See what I'm saying – vouch for me – everybody that was at that party.

[APPELLANT'S MOTHER]: Yeah. (Emphasis added.)

The State next played a telephone conversation between appellant and his mother on July 15, 2007. Appellant told his mother that "they saying I supposed to did that at 10:10." He also said that at "10:10 Ma and I ain't leave, I ain't leave outside really about up Douglas until like 11 o'clock any mu [sic], any way, you see what I'm saying. You did my hair and everything, my hair was all over my head, come on now, Ma."

The State showed Detective Diaz State's Exhibit No. 30, which was a redacted version of the alibi notice that appellant's attorney had submitted on February 5, 2008. Although the alibi notice initially contained the names of eleven witnesses, the redacted version contained only the name of appellant's father, and was in the form of a pleading, signed by appellant's attorney.

Defense counsel again objected. At the bench, the following occurred:

[APPELLANT'S COUNSEL]: Okay. Your Honor, my objection is that the document [i.e., the redacted alibi notice], in and of itself, is tantamount to a pleading . . . . * * * It's not evidence in this case.

* * *

THE COURT: Pleadings can be if there are admissions.

[APPELLANT'S COUNSEL]: But they're – it's prepared by counsel, it's not . . . .

THE COURT: It's an agent of a defendant.

[APPELLANT'S COUNSEL]: That's correct and I just

> want it placed on the record so the Court knows. As I indicated previously, Mr. Sims was represented by another attorney. I picked up his case after [appellant] had been charged, had his indictment, had been arraigned. I did not enter my appearance in this case until January and as his attorney I felt duty bound to turn over whatever information I had.
>
> THE COURT: Understood.
>
> [APPELLANT'S COUNSEL]: And it's not necessarily proper to assume the information I had came from the defendant and entering this Notice of Alibi Witness into evidence, I believe creates that aura that it came from him.
>
> THE COURT: On a personal level, I'm sympathetic . . . . but I, as I understand the law, an emaciate [sic] pleading can be an admission and when you enter into a pleading on his behalf, it is – can be an admission against him. The record should reflect that Exhibit 30 has been redacted so that only one name of the, I don't know, dozen that you submitted, is going to the jury and the reason and that one name is Perry Simms, Senior –. * * * [A]nd the only reason I'm letting it in is because of the taped conversation which he says his father was out of town. I would not let in other names for all kinds of reasons so your objection's noted, appreciated, overruled.

The State then offered State's Exhibit 30 into evidence. Appellant again objected, the court again overruled the objection, and the redacted alibi notice was admitted.

After the prosecution rested, appellant rested. He did not testify or call any witnesses.

Immediately before giving "formal instructions on the law," the court announced to the jury a "preliminary instruction on the evidence," stating:

> Ladies and gentlemen, there was some tapes played for you recently during the trial. And there was some references there to potential alibi witnesses, and I want to tell you to strike from your mind any references about alibi witnesses except as the testimony concerned the defendant's father and mother. Other than father and mother, you should strike it from

the record and do not consider it.

Held: Reversed and remanded. The trial court erred or abused its discretion at trial by permitting the State to introduce against the defendant a redacted version of the defendant's pretrial alibi notice, when the defendant did not testify or present a defense case. Maryland Rule 4-263 does not expressly bar admission of an alibi notice, in contrast to the federal rule. But, the purpose of the discovery rule is to allow the State to investigate the merits of an alibi defense. That purpose was not served by the State's admission of the alibi notice into evidence at trial. Moreover, the State's admission of an alibi notice contravenes the principle that a defendant has no burden to present a defense.

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Ronald Cox v. State of Maryland, No. 473, September Term, 2009. Opinion filed on September 17, 2010 by Graeff, J.

http://mdcourts.gov/opinions/cosa/2010/473s09.pdf

CRIMINAL LAW - CONFRONTATION CLAUSE - TESTIMONIAL STATEMENTS - TACIT ADMISSIONS - MD RULE 5-803(a)(2) - FRUIT OF THE POISONOUS TREE - ATTENUATION DOCTRINE - SUFFICIENCY OF THE EVIDENCE.

Facts: On December 28, 2007, Baltimore City Police answered a call for a shooting at a shopping center. The victim, who was found bleeding and unresponsive, sustained a gunshot wound to the head, and the cause of death was later deemed a homicide.

On January 29, 2009, a jury sitting in the Circuit Court for Baltimore City convicted appellant of first degree murder, use of a handgun in the commission of a felony or a crime of violence, wearing, carrying or transporting a handgun, and possession of a regulated firearm after conviction of a disqualifying crime.

In a motions hearing prior to trial, the court granted appellant's motion to suppress a gun found in his vehicle during a traffic stop, after finding that the detention "exceeded the scope of the purported reason for the traffic stop." In a subsequent motions hearing, the court denied appellant's motion to suppress statements made to another inmate in central booking. It rejected appellant's contention that his statements were the "fruit" of the illegal detention.

The court also rejected the argument that admission of the statements made by Mr. Johnson, appellant's former co-defendant, violated appellant's right to confrontation. In admitting these statements, the court found that Mr. Johnson's statements to the inmate were made in the presence of appellant, who reasonably would have disagreed with the statements if untrue, and therefore, with one exception, the statements to the inmate were admissible as tacit admissions of appellant.

Held: Judgments affirmed. In *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004), the Supreme Court held that the Sixth Amendment, which protects a criminal defendant's right to confront the witnesses against him, prohibits the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." Only testimonial statements implicate the Confrontation Clause. Remarks made by one inmate to another inmate, while in the recreational room of central booking, were not testimonial statements. The statements

were not formal, they were not elicited in response to government questioning, and they were not made under circumstances in which a reasonable person would believe that the statements would be available for use at a later trial. Because the statements were not testimonial, their admission did not violate appellant's right of confrontation.

Admission of the statements made by appellant's accomplice did not violate the Confrontation Clause for the additional reason that they constituted tacit admissions by appellant. A tacit admission is a statement that the defendant has adopted as his or her own. When such a statement is admitted into evidence, the "witness" against the defendant is the defendant, and there is no violation of the right to confront "the witnesses against him."

Appellant's own statements to the inmate at central booking were not inadmissible as the "fruit of the poisonous tree." Although the trial court held that the initial detention of appellant, which led to a search of the car appellant was driving and appellant's subsequent arrest, was illegal, appellant's subsequent statements were sufficiently attenuated to dissipate the taint of the initial illegality. The statements, which were made the day after the arrest, were not the product of police exploitation of the illegal arrest. Rather, they were an unexpected voluntary admission during a conversation with another inmate in jail to the commission of an unrelated crime.

The evidence was sufficient to support appellant's convictions. There was sufficient evidence to corroborate appellant's extrajudicial confession to a fellow inmate in central booking. Appellant's admissions regarding the murder were corroborated by evidence that the victim was dead, as well as by testimony that the cause of death was homicide. Moreover, the admission that appellant's accomplice, Mr. Johnson, used a gun, which was described as a "nine," was corroborated by the discovery of a 9-millimeter cartridge casing at the scene of the murder.

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Khiry Montay Moore v. State of Maryland, No. 1737, September Term, 2008, decided September 3, 2010. Opinion by Davis, J.

http://mdcourts.gov/opinions/cosa/2010/1737s08.pdf

CRIMINAL LAW - COURTS AND JUDICIAL PROCEEDINGS - Md. Code (2006 Rep. Vol., 2007 Supp.), Courts and Judicial Proceedings Article § 10–912 (providing that (a) a confession may not be excluded from evidence solely because the defendant was not taken before a judicial officer after arrest within any time period specified by Title 4 of the Maryland Rules and (b) failure to strictly comply with the provisions of Title 4 of the Maryland Rules pertaining to taking a defendant before a judicial officer after arrest is only one factor, among others, to be considered by the court in deciding the voluntariness and admissibility of a confession); Maryland Rule 4-212(e), which provides, in pertinent part: "The defendant shall be taken before a judicial officer of the District Court without unnecessary delay and in no event later than 24 hours after arrest . . . ."; *Williams v. State*, 375 Md. 404 (2003); *Facon v. State*, 375 Md. 435 (2003); *Hiligh v. State*, 375 Md. 456 (2003) and *Odum v. State*, 156 Md. App.184, 202-04 (2004). *Lee v. State*, 405 Md. 148 (2008); *Clermont v. State*, 348 Md. 419, 456 (1998); *Rubin v. State*, 325 Md. 552, 588 (1992) (because the claim of improper argument was unpreserved, the Court must find that it rises to the level of depriving appellant of a fair trial in order to justify reversal). *Newton v. State*, 280 Md. 260, 269 (1977) (the evidence required to establish the underlying felony is the same evidence required to prove the first-degree felony murder; therefore, the sentences must merge). *Lee v. State*, 186 Md. App. 631, 661, *cert. granted*, 411 Md. 355, 662 (2009)(fundamental fairness requires instructions on second-degree murder and involuntary manslaughter "only if they are lesser included offenses of first-degree felony murder.").

Facts: Appellant was charged with first-degree felony murder, involuntary manslaughter, conspiracy to commit robbery, three counts of attempted robbery with a dangerous weapon and three counts of use of a handgun in the commission of a crime of violence. Appellant and his friends approached the victim and his two teenage friends to rob them when a shot was fired. One of the three victims was killed and the other two ran away. Appellant was arrested and held for twelve and one-half hours before being presented to a Commissioner. Appellant was heard, by a co-defendant, saying that he shot the victim by accident.

Sixteen-year-old appellant contended, *inter alia*, that, because his "intelligence was below average," evidenced by the

fact that he did not know his zip code, what his mother did for a living or his grandmother's first name, his confession, obtained after a twelve-and-one-half-hour delay before taking him before a district court commissioner, was rendered involuntary. The trial court held that, despite the delay, under a totality of circumstances, appellant's confession was not involuntary. Appellant also argued that he was entitled to a new trial because the prosecutor called him a "gangster" and a "thug" during closing argument. Finally, appellant argued that the trial court erred in failing to merge one count of attempted robbery into his felony murder conviction and in failing to sentence him for involuntary manslaughter instead of first-degree felony murder when he was convicted of both. The State conceded error in the court's failure to merge the attempted robbery sentence with appellant's sentence for first-degree felony murder.

Held: Although, as the circuit court observed, a portion of the delay in presentment of appellant to a court commissioner was deliberate and for the purpose of obtaining a confession, the circuit court did not err in concluding that the circumstances surrounding the interrogation, taken as a whole, did not indicate that appellant's confession was involuntary. Appellant remained awake and alert and he was offered food, drink and bathroom breaks. The only request that appellant made, which was denied, was to call his mother, which was permissible in light of the fact that police were executing a search warrant on the mother's home. With regard to closing argument, the Court found that only one comment was arguably unsupported by the evidence, but appellant's claim was not preserved and did not rise to the level of depriving appellant of a fair trial. Finally, the court was not required to impose the "lesser" sentence of involuntary manslaughter instead of first-degree felony murder because involuntary manslaughter is not a lesser-included offense of first-degree felony murder. Although the court instructed the jury on the same elements for the unlawful act variety of involuntary manslaughter and first-degree felony murder, employing attempted armed robbery as both the underlying unlawful act and the underlying felony, the involuntary manslaughter was given in error. The court was not required to sentence appellant for unlawful act involuntary manslaughter.

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Kenneth Barnes, Jr. v. State of Maryland, No. 1112, September Term 2009, filed September 20, 2010. Opinion by Wright, J.

http://mdcourts.gov/opinions/cosa/2010/1112s09.pdf

CRIMINAL LAW & PROCEDURE – ILLEGAL SENTENCES – SEX OFFENDERS LEGISLATION – AMENDMENTS – INTERPRETATION

Facts: Barnes sought review of the Circuit Court for Baltimore City's denial of his motion to correct an illegal sentence. The motion, which was filed on March 30, 2009, involved two cases and was decided jointly through a single order. The first case pertained to Barnes's August 31, 1998 conviction for third degree sexual offense committed in 1996, and the second case pertained to his August 19, 2005 conviction for failing to timely notify the sex offender registry of an address change. On June 15, 2009, without holding a hearing, the court issued an order denying Barnes's motion.

Barnes timely appealed, arguing that the circuit court erred because the Maryland sex offender registration law that went into effect on October 1, 1997 "did not apply retroactively to [his] alleged misconduct in 1996" and, therefore, he should have never been required to register. Further, Barnes argued that, as a result, his "conviction and sentence for the 2005 registry violation are also illegal."

Held: Affirmed. The Maryland sex offender registration law that went into effect on October 1, 1997 applied to child sex offenders who committed a sexual offense between October 1, 1995 and June 30, 1997, even if they were not convicted until July 1, 1997 or thereafter. When the statute is read in its entirety, it is pellucid that the legislature intended for the registration requirement to apply to all child sexual offenders who were convicted of a child sexual offense committed after October 1, 1995.

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Jefferson v. State, No. 1013, September Term, 2008, filed September 2, 2010. Opinion by Woodward, J.

http://mdcourts.gov/opinions/cosa/2010/1013s08.pdf

CRIMINAL LAW - JURY - ITEMS TAKEN TO JURY ROOM - TRIAL COURT MAY PROVIDE DELIBERATING JURY WITH A WRITTEN COPY OF APPLICABLE STATUTE UNDER MARYLAND RULE 4-326(b)

Facts: During the jury's deliberations at appellant Kenneth Jefferson's trial for, among other charges, wearing, carrying, or transporting a handgun on or about his person, the jury sent a note to the trial judge requesting a copy of the applicable statute, Maryland Code (2002, 2009 Supp.), § 4-203 of the Criminal Law Article ("C.L."). Over Jefferson's objection, the Circuit Court for Baltimore City provided the jury with a copy of C.L. § 4-203(a). On appeal, Jefferson claimed that the trial court erred, because Maryland Rule 4-326(b) does not provide for the submission of a copy of a statute to the jury room during deliberations.

Held: Affirmed. Rule 4-326(b) authorizes the trial court to provide the jury with a written copy of the applicable statute, because that is no different than providing a written copy of an oral jury instruction, which is explicitly permitted by Rule 4-326(b). For instance, the trial court may read a statute to the jury as part of its oral jury instruction and then provide the written version of the oral jury instruction to the jury, in effect providing the jury with a written copy of the referenced statute. This is distinguishable from *Hebb v. State*, 44 Md. App. 678 (1980), where the Court held that it was error for the trial court to send the *Maryland Criminal Pattern Jury Instructions* into the jury room during deliberations.

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Raymond Charles Lupfer v. State of Maryland, No. 1046, September Term, 2008, filed September 3, 2010. Opinion by Graeff, J.

http://mdcourts.gov/opinions/cosa/2010/1046s08.pdf

CRIMINAL LAW - POST-*MIRANDA* SILENCE - INVOCATION OF RIGHT TO COUNSEL - FAIR RESPONSE - SEQUESTRATION ORDER - MARYLAND RULE 5-615.

Facts: On June 16, 2007, appellant shot and killed Jeremy Elijah Yarbray. At trial, there was no dispute that appellant shot Mr. Yarbray, but the State and appellant presented conflicting evidence regarding the circumstances surrounding the shooting. Several witnesses testified regarding a fight between appellant and Mr. Yarbray and indicated that appellant then produced a handgun and shot Mr. Yarbray as he fled. Appellant testified, however, that he saw Mr. Patton fighting with Mr. Yarbray. He saw a handgun in the middle of the floor, and he tried to pick it up so the other men would not use it in the fight. Appellant and Mr. Yarbray grabbed the gun at the same time, and the gun accidently discharged three times.

Immediately after the shooting, appellant fled to New Jersey. He testified, however, that he returned to Maryland the next day to "go talk to the police." Before he was able to contact the police voluntarily, they arrested him at the truck stop.

On cross-examination, appellant testified that he returned to Maryland because he "wanted to get the situation straightened out" and "there is only one person that is going to say what needs to be said, and that was me." The prosecutor then questioned appellant regarding what occurred after he was arrested. Appellant testified that, "[b]efore they slid the charges charging me with first degree murder," the police "did not give me a chance to say anything. And when I seen the charges, I asked for a lawyer."

The State then called Sergeant David Sexton as a rebuttal witness. The prosecutor asked Sergeant Sexton about his efforts to question appellant following his arrest, and Sergeant Sexton testified: " I read him his advice of rights and he elected not to answer any questions. He said he would have to talk to a lawyer because those charges were very serious and he wanted to speak to a lawyer."

During trial, counsel requested that the court declare a mistrial or strike several witnesses' testimony based on evidence that witnesses discussed their testimony in violation of a sequestration order.

The jury convicted appellant of second degree murder, first degree assault, and use of a handgun in the commission of a felony. The court imposed a sentence of 30 years for the conviction of second degree murder and ten years consecutive for the conviction of use of a handgun in the commission of a felony.

Held: Judgment affirmed. Although a defendant's post-*Miranda* silence generally is inadmissible, the State may introduce such evidence when it is introduced in fair response to an issue that is generated by the defense regarding the defendant's interaction with the police. When a defendant creates the impression that he or she cooperated with the police, the State may introduce evidence of the defendant's post-*Miranda* silence to rebut that impression. Here, the evidence of appellant's post-*Miranda* silence was introduced, not as substantive evidence of guilt or to impeach an affirmative defense, but to rebut the impression that appellant created regarding his intent to cooperate with the police. The trial court did not err or abuse its discretion in admitting this evidence.

Appellant's argument that the trial court erred in admitting evidence that appellant, when questioned by police, asked to speak with an attorney is not preserved for our review. The State did not ask questions designed to elicit that testimony, and when appellant volunteered that he requested to speak with a lawyer, defense counsel did not object or otherwise alert the court that an analysis different from that regarding the admission of his silence was required. Counsel's failure to make his objection known renders this claim unpreserved for this Court's review.

Even if preserved, the Court would not find reversible error. Evidence that appellant consulted an attorney was not admitted to show consciousness of guilt. Rather, the testimony was volunteered in response to questions designed to show that, although appellant testified that he intended to cooperate with the police, he chose not to do so after he was in police custody. The two brief references to appellant's request for a lawyer fairly can be characterized as "incidental" or "fleeting," and there was no mention of the request by the prosecutor in closing argument. Even if the issue was preserved for appellate review, the Court would find that it did not warrant reversal of appellant's convictions.

Where there was evidence that witnesses commented on their testimony in violation of a sequestration order, but there was no evidence that the witnesses discussed details that would influence another witness' testimony, the circuit court did not abuse its discretion in denying appellant's motions for a mistrial or to strike witness testimony.

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Oscar Sanders v. State of Maryland, No. 1011, September Term, 2008, filed September 2, 2010. Opinion by Graeff, J.

http://mdcourts.gov/opinions/cosa/2010/1011s08.pdf

CRIMINAL LAW - SCOPE OF VOIR DIRE - INQUIRY INTO PROSPECTIVE JURORS' STRONG FEELINGS ABOUT SPECIFIC OFFENSES - ADMISSIBILITY OF EVIDENCE - MD. RULE 5-403.

Facts: On January 23, 2008, a Baltimore City resident reported that his vehicle was stolen from behind his rowhouse. The police subsequently located the victim's car, as it was being driven through a Home Depot parking lot, and arrested appellant, the driver of the stolen vehicle.

On May 29, 2008, a jury sitting in the Circuit Court for Baltimore City convicted appellant of motor vehicle theft, theft of property with a value over $500, and unauthorized use of a motor vehicle. Prior to trial, defense counsel requested the court to ask the prospective jurors during voir dire if any of the jurors had "strong feelings concerning motor vehicle theft . . . that would render the juror unable to render a fair and impartial verdict." The trial court declined to ask this question.

Also prior to trial, the court granted the State's motion *in limine*, which precluded appellant's counsel from mentioning or asking about appellant's self-serving statement to the police indicating that appellant did not know who owned the stolen vehicle and that some "dude" paid him $40 to drive the vehicle to Home Depot.

Held: Judgments affirmed. The purpose of voir dire in Maryland is to determine "the existence of cause for disqualification and not, as in many other states, to include the intelligent exercise of peremptory challenges." *Stewart v. State*, 399 Md. 146, 158 (2007). Unless a question involves an area of mandated inquiry, the scope of voir dire and the form of the questions asked "rest firmly within the discretion of the trial judge." *Id.* at 159. This Court and the Court of Appeals have mandated inquiry regarding prospective jurors' feelings about specific offenses that tend to evoke strong passion and prejudice that could impact a juror's ability to act as a fair and impartial juror. When the crime charged, however, is not one likely to evoke strong passion or prejudice, and there is not a reasonable likelihood that the question would reveal a basis for disqualification, the court is not required to ask whether the venire has strong feelings about the crime.

Motor vehicle theft generally is not the type of crime that has the tendency to evoke such strong passion or prejudice that a court is required to ask the potential jurors if they have strong feelings about the crime that would render them unable to render a fair and impartial verdict. Although it certainly is within the court's discretion to ask such a question, it is not an abuse of its discretion to decline to ask the question.

The trial court properly exercised its discretion in precluding the defense from introducing appellant's self-serving statement that he made to the police when the State did not introduce it into evidence. Reference to the statement, when that statement was not admissible and not introduced into evidence, likely would have confused the jury and caused it to speculate regarding why the statement was not introduced into evidence.

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Emmanuel L. Jones v. State of Maryland, No. 918, September Term, 2008, filed September 1, 2010. Opinion by Woodward, J.

http://mdcourts.gov/opinions/cosa/2010/918s08.pdf

CRIMINAL LAW - TRESPASS ON POSTED PROPERTY - PROBABLE CAUSE - MARYLAND CODE (2002), CRIMINAL LAW ARTICLE § 6-402(a) DOES NOT REQUIRE POLICE OFFICERS TO CONFIRM THAT A SUSPECT IS BANNED FROM A POSTED PROPERTY TO HAVE PROBABLE CAUSE TO ARREST THE SUSPECT FOR TRESPASSING ON POSTED PROPERTY.

Facts: Appellant, Emmanuel L. Jones, was arrested for trespass on posted property. A search of Jones's person incident to the arrest produced a quantity of drugs. Jones moved to suppress, contending that the drugs seized were the result of an illegal search because the police did not have probable cause to arrest him.

The evidence adduced at the suppression hearing showed that "no trespassing" signs were conspicuously posted at 612 Baker Street, Salisbury, Maryland, that a police officer saw Jones enter onto 612 Baker Street in the face of those signs, and that the officer knew that Jones did not own the 612 Baker Street property. The officer stopped Jones in the front yard of 612 Baker Street and observed that Jones appeared nervous and avoided making eye contact. When the officer asked Jones whether he had anything illegal on his person, Jones emptied the contents of his pockets, with the exception of his front right pocket. According to the officer's testimony, Jones "was detained" at that point in the factual chronology. The officer then learned from Jones that he did not live at 612 Baker Street. The officer attempted to ascertain whether Jones was authorized to be on the subject property by knocking on the door, but no one answered. Jones was subsequently arrested for trespassing. The police officer conducted a search incident to the arrest and discovered what appeared to be narcotics in Jones's front right pocket. A sample of the narcotics tested positive for cocaine.

At the conclusion of the hearing, the Circuit Court for Wicomico County denied Jones's motion to suppress.

Held: Affirmed. The Court of Special Appeals held that the evidence presented at the suppression hearing established that the police officer had probable cause to arrest Jones for trespassing on posted property. The Court ruled that the officer had reasonable suspicion to believe that Jones was committing a trespass on posted property under Criminal Law Article § 6-402(a). In support of that ruling, the Court noted that the police officer

saw Jones enter onto property that had "no trespassing" signs conspicuously posted and knew that Jones was not an owner of the property. Because the officer did not know whether Jones lived at 612 Baker Street, the Court determined that the officer had the legal right "to stop and briefly detain" Jones, *Wilson v. State*, 409 Md. 415, 425 (2009), to investigate the circumstances that provoked the suspicion.

Jones argued that the officer's testimony that he "was detained" meant that Jones was arrested. Furthermore, Jones contended that he was not asked for his address until after his "detention," *i.e.*, "arrest," and thus Jones's response could not be factored into determining whether probable cause had been established. The Court rejected that argument for three reasons. First, the police officer used the word "detain," not "arrest," in his testimony. Second, there was no evidence that the officer made a custodial arrest of Jones at the time that the officer said that Jones "was detained." Third, the standard of review required the Court to consider the evidence "and the inferences that may be reasonably drawn in the light most favorable to the prevailing party," in this case, the State. The Court thus inferred from the officer's testimony that, when he "detained" Jones, the officer did nothing more than a *Terry* stop. Accordingly, the Court ruled that the officer was entitled to conduct a further investigation into Jones's status at 612 Baker Street. That investigation revealed that Jones did not live at 612 Baker Street.

The Court also rejected Jones's contention that probable cause could not exist unless the police determined that Jones was prohibited from entering 612 Baker Street. The Court explained that there are two criminal trespass statutes in Maryland: wanton trespass, under Criminal Law Article § 6-403(a), and trespass on posted property, under Criminal Law Article § 6-402(a). According to the Court, only the wanton trespass statute requires police officers to determine that an accused is banned from the property for probable cause to exist; the trespass on posted property statute has no such requirement. Therefore, when examining the facts adduced from the officer's testimony and the inferences that could be reasonably drawn from them in the light most favorable to the State, the Court concluded that the trial court properly determined that there was probable cause to arrest Jones for trespassing on posted property.

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Blake G. Bussell v. Komesi Bussell, No. 1784, September Term, 2009, decided September 1, 2010. Opinion by Davis, J.

http://mdcourts.gov/opinions/cosa/2010/1784s09.pdf

FAMILY LAW - DIVORCE - Maryland Rule 2-601; Maryland Rule 8-602(d); *Carr v. Lee*, 135 Md. App. 213, 226 n.4 (2000) (noting that, "if a notice of appeal is filed after a docket entry reflecting the decision but before the written order is signed and filed, if a written order is contemplated by the court or required by Md. Rule 2-601, Md. Rule 8-602(d) may save that appeal. . . . Contrary to *Waller v. Maryland Nat'l Bank*, 332 Md. 375 (1993) and *Jenkins v. Jenkins* [112 Md. App. 390 (1996)], in light of the requirement of a separate judgment in Md. Rule 2-601 as amended, it appears that the appeals should be saved. . . .").

Facts: Appellee filed a Complaint for Absolute Divorce and the trial court held a *pendente lite* hearing on September 30, 2009, temporarily resolving matters including custody, visitation, child support and use and possession of the family home. The court delivered its ruling orally, disposing of all matters before it, and advised the parties to put the terms of the ruling in an order and submit it to the court within thirty days. Five days later, appellant noted his appeal, but the order was not submitted until October 28, 2009. A status conference, originally set for October 30, 2009, was postponed until November 3, 2009, when appellee and the children's attorney appeared, but appellant did not appear. The court signed the written order, documenting its earlier oral rulings in open court and it was docketed that same day.

Held: Appellant appealed after the judge's oral ruling, but before the order was signed and docketed. Appellant's premature appeal is saved by Maryland Rule 8-602(d) in light of the revisions to Maryland Rule 8-602(d) and the addition of the separate document requirement to Maryland Rule 2-601. There were no further issues to be resolved and the trial judge merely requested that the parties put his complete oral ruling in writing. Maryland Rule 8-602(d) no longer requires an ". . . order that would be appealable upon its entry on the docket," but instead applies to a notice of appeal "filed after the announcement . . . of a ruling, decision order or judgment but before entry . . . on the docket . . . ." *Carr*, 153 Md. App. at 224-227. Now judges must always provide for their oral rulings to be later put into writing in a separate document under Maryland Rule 2-601. In light of the Court of Special Appeals' observation in *Carr*, 153 Md. App. at 226 n.4, commenting upon the Rule revisions, appellant's premature appeal is saved by Maryland Rule 8-602(d).

As to the merits of appellant's appeal, the court did not err in granting *pendente lite* use and possession of the marital home and custody of the minor children to appellee, nor did it err in ordering appellant to pay *pendente lite* alimony to appellee.

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Agency Insurance Co. v. State Farm Mutual Automobile Insurance Co., et al., No. 595, September Term, 2009, filed July 8, 2010. Opinion by Woodward, J.

http://mdcourts.gov/opinions/cosa/2010/595s09.pdf

INSURANCE - AUTOMOBILE LIABILITY COVERAGES - NAMED AND ADDITIONAL INSUREDS UNDER OMNIBUS CLAUSES - NAMED INSURED'S AUTHORITY TO GRANT PERMISSION TO OPERATE A VEHICLE

Facts: On December 30, 2005, Aaron Zufall was driving a Ford Escort (the "Escort") owned by Barbara Brooks and insured by State Farm Insurance Company ("State Farm"). There were two additional passengers in the Escort: Emily Pugh, Brooks' daughter, and Tom Mullinex. While driving on State Route 75, the Escort struck a vehicle driven by Lauren DeLodovico. Both Pugh and DeLodovico were killed as a result of the accident.

Under State Farm's insurance policy covering the Escort, Brooks was listed as a named insured and Pugh was covered as a resident relative. Zufall was insured under his parent's policy with Allstate Insurance Company ("Allstate"). DeLodovico was an insured under a policy with Agency Insurance Company ("Agency"). After the accident, Agency filed a Complaint for Declaratory Judgment in the Circuit Court for Baltimore County against State Farm and Allstate. Agency's complaint requested that the court "[d]etermine and adjudicate the rights and liability of the parties with respect to the policies involved."

The court held a one-day bench trial, and Brooks was the only witness to testify at the trial. Brooks testified that she purchased, maintained, and insured the Escort. Brooks also stated that the Escort was titled and registered in her name only, and that she only allowed Pugh to drive the car to high school, work, and when she was volunteering at a local hospital. Brooks testified that she gave Pugh permission to drive to Zufall's house on December 30, 2005. Brooks knew that Zufall and Pugh planned to drive to Burkittsville, Maryland that same evening, and, therefore, instructed Pugh that Pugh was only allowed to drive the Escort to Zufall's house and back. Brooks told Pugh that the car was to remain at Zufall's residence once Pugh was there. Brooks never gave Zufall permission to drive the Escort that evening.

The depositions of Zufall and Mullinex were also introduced into evidence. Zufall testified that Pugh volunteered the use of the Escort and gave him the keys. Mullinex, however, claimed that Pugh handed over the keys after Zufall stated his desire to drive the car.

The trial court ruled that neither State Farm nor Allstate was required to defend or indemnify Zufall, because he did not have permission to drive the Escort at the time of the December 30, 2005 accident. Agency timely appealed.

Held: Affirmed. The Court of Special Appeals first held that the trial court did not err in determining that State Farm was not obligated under its policy to defend or indemnify Zufall. As a preliminary matter, the Court reaffirmed that an insurance policy is a contract under Maryland Law. Consequently, the usual principles of contract interpretation applied, which required that State Farm's insurance policy be interpreted as a whole, in accordance with the objective law of contracts, to determine its character and purpose.

The Court observed that State Farm's insurance policy contained an "omnibus clause," which extended coverage to individuals other than the named insured. Agency argued that Zufall was an insured at the time of the accident under section 5 of the omnibus clause. According to Agency, Zufall was covered under the plain language of section 5 as a person "liable for the use of such a car by one of the above insureds, [*i.e.*, Pugh]." The Court rejected Agency's argument, stating that Zufall was covered under section 5 of the omnibus clause only if his liability arose from Pugh's negligent use of the Escort. The Court relied on *Beasley v. Allstate Insurance Company*, 246 S.C. 153 (S.C. 1965) as support. Because Agency's suit was based on Zufall's own negligence, the Court ruled that section 5 the omnibus clause did not provide coverage for Zufall.

The Court also held that the trial court did not err in determining that Allstate was not obligated to defend or indemnify Zufall while he was operating a non-owned vehicle. According to the Court, the personal automobile policy that had been issued by Allstate to Zufall's parents covered Zufall at the time of the accident only if the Escort was an "insured auto." The Allstate policy defined "insured auto" as "[a] non-owned auto used by [the named insured] or a resident relative with the owner's permission." The Court rejected Agency's argument that Pugh was an "owner" who had the ability to grant Zufall permission to drive the Escort on the evening of December 30, 2005. The Court explained that Pugh did not have lawful possession of the Escort at the time of the accident because, once Zufall left in the Escort to pick up Mullinex's cousin, Pugh had exceeded the scope of Brooks' permission.

Finally, the Court ruled that Zufall's reasonable belief that Pugh could grant permission to use the Escort was irrelevant to the resolution of the coverage issue. The Court noted that there was no language in the Allstate policy that provided insurance coverage

when Zufall had a reasonable belief that he had permission from the owner to drive the vehicle. The Allstate policy required "the owner's permission," which in this case was Brooks, not Pugh. Thus the Court concluded that Brooks' Escort was not an "insured auto" under Allstate's policy.

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BTR Hampstead, LLC v. Source Interlink Distribution, LLC, No. 199, September Term, 2009, filed September 14, 2010. Opinion by Woodward, J.

http://mdcourts.gov/opinions/cosa/2010/199s09.pdf

REAL PROPERTY – EVICTION - LANDLORD/TENANT - ACTUAL EVICTION - ACTUAL EVICTION CAN OCCUR WHEN THE CONDUCT OF THE LANDLORD OR SOMEONE WHOSE CONDUCT IS ATTRIBUTABLE TO HIM INTERFERES WITH THE TENANT'S PERMISSIBLE USE OF THE LEASED PROPERTY

LANDLORD - TENANT - TERMINATION OF LEASE - WAIVER - A TENANT HAS NOT WAIVED ITS RIGHT TO TERMINATE A LEASE WHEN THE TENANT'S ACTIONS DID NOT AFFECT THE LANDLORD'S USE AND/OR RETAKING OF THE PROPERTY

Facts: Appellee, Source Interlink Distribution, LLC ("Source Interlink"), a tenant of commercial warehouse space, decommissioned the leased premises and was no longer actively using the space. Source Interlink, however, continued to fulfill its obligations under the lease. A flood occurred in an adjoining space, and appellant landlord, BTR Hampstead, LLC ("BTR"), allowed the lessee of that space to move into Source Interlink's premises and fully operate out of those premises. Source Interlink neither consented to nor authorized the occupancy and use of its warehouse space. Although BTR repeatedly told Source Interlink that the use of its space was only temporary, the adjoining lessee used Source Interlink's space for six months. After four months, Source Interlink filed suit and asked the Circuit Court for Carroll County to terminate the lease and award damages in the amount of the rent and other charges paid by Source Interlink for the first four months. The trial court ruled in favor of Source Interlink.

Held: Affirmed. Under the Restatement (Second) of Property: Landlord and Tenant § 6.1, an unauthorized possession of all or any part of the leased property by the landlord, or someone whose conduct is attributable to him, is an actual eviction of the tenant. The Court of Special Appeals rejected BTR's argument that the use of Source Interlink's space by the adjoining lessee was not an eviction because it did not affect Source Interlink's actual use of the leased premises. An actual eviction can occur when the conduct of the landlord or someone whose conduct is attributable to him interferes with a tenant's "permissible use" of the leased property, not just the actual use.

The Court also upheld the trial court's determination that Source Interlink had not waived its right to claim an eviction by failing to file the instant action for four months after the flood. Finally, the Court held that Source Interlink had not waived its

right to terminate the lease by its conduct after the suit was filed. The Court rejected BTR's contention that by keeping the keys to the premises, monitoring the property for safety and security purposes, and leaving certain equipment on the premises, Source Interlink waived its right to terminate the lease. The Court stated that Source Interlink's actions did not affect the landlord's use and/or retaking of Source Interlink's premises after the suit was filed to terminate the lease.

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ATTORNEY DISCIPLINE

By an Order of the Court of Appeals of Maryland dated September 9, 2010, the following attorney has been disbarred by consent from the further practice of law in this State:

RICHARD GLENN SOLOMON
*

The following attorney has been replaced upon the register of attorneys in the Court of Appeals of Maryland effective September 20, 2010:

JEFFREY KEITH GORDON
*

JUDICIAL APPOINTMENTS

On July 23, 2010 the Governor announced the appointment of SHANNON E. AVERY to the District Court for Baltimore City. Judge Avery was sworn in on August 16, 2010 and fills the vacancy created by the retirement of the Hon. Keith E. Matthews.

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On July 23, 2010 the Governor announced the appointment of LEO RYAN, JR. tot the District Court for Baltimore County. Judge Ryan was sworn in on August 16, 2010 and fills the vacancy created by the retirement of the Hon. Edward P. Murphy.

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On July 23, 2010 the Governor announced the appointment of the HON. MICHELLE D. HOTTEN to the Court of Special Appeals. Judge Hotten was sworn in on August 17, 2010 and fills the vacancy created by the retirement of the Hon. James P. Salmon.

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On July 23, 2010 the Governor announced the appointment of MARSHA L. RUSSELL to the District Court for Baltimore County. Judge Russell was sworn in on August 18, 2010 and fills the vacancy created by the retirement of the Hon. Darryl G. Fletcher.

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On July 23, 2010 the Governor announced the appointment of STEVEN D. WYMAN to the District Court for Baltimore County. Judge Wyman was sworn in on August 19, 2010 and fills the vacancy created by the elevation of the Hon. Jan M. Alexander to the Circuit Court.

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On July 23, 2010 the Governor announced the appointment of KAREN FRIEDMAN to the District Court for Baltimore City. Judge Friedman was sworn in on August 23, 2010 and fills the vacancy created by the elevation of the Hon. Videtta A. Brown to the Circuit Court.

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On July 23, 2010 the Governor announced the appointment of Master YOLANDA A. TANNER to the Circuit Court for Baltimore City. Judge Tanner was sworn in on August 27, 2010 and fills the vacancy created by the resignation of the Hon. Kay A. Allison.

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On July 23, 2010 the Governor announced the appointment of RICARDO D. ZWAIG to the District Court for Howard County. Judge Zwaig was sworn in on August 27, 2010 and fills the vacancy created by the retirement of the Hon. Alice P. Clark.

*

On July 23, 2010 the Governor announced the appointment of AUDREY A. CREIGHTON to the District Court for Montgomery County. Judge Creighton was sworn in on September 2, 2010 and fills the vacancy created by the elevation of the Hon. Cheryl A. McCally to the Circuit Court.

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