Amicus Curiarum

VOLUME 24
ISSUE 10 October 2007

A Publication of the Office of the State Reporter

Table of Contents

COURT OF APPEALS

COURT OF SPECIAL APPEALS

COURT OF APPEALS

ATTORNEYS - ATTORNEYS LIENS - BANKRUPTCY - EFFECT OF DISCHARGE - STATUTORY ATTORNEY'S LIEN

Facts: Lori Denise Rhoads retained Fred S. Sommer to file an employment discrimination lawsuit against her former employer. Sommer filed a federal suit on behalf of Rhoads. In February 1997, the United States District Court for the District of Maryland granted summary judgment to the former employer on nine of Rhoads' ten claims. *Id.* A jury subsequently found in the employer's favor on the remaining claim.

On March 27, 1998, Rhoads filed a voluntary petition for Chapter 7 bankruptcy. In her bankruptcy schedules, Rhoads listed Fred S. Sommer, Esq. as a creditor holding an unsecured nonpriority claim in the amount of $190,000 for legal services. Rhoads also disclosed on her petition's statement of financial affairs that she was party to a "[c]ivil claim for damages, "which had resulted in a "judgment for defendant 3/4/96, time for appeal has not expired." After reviewing Rhoads' petition, the bankruptcy trustee filed a report of no distribution on May 8, 1998, releasing to Rhoads any interest she might have in her civil claim.

Sommer filed a reply brief in May 1998 on Rhoads' behalf regarding her motion for judgment as a matter of law and motion for new trial, originally filed in March 1998 and now active again because the bankruptcy trustee relinquished her claim. Relations between the parties soured, however, and Sommer officially withdrew as Rhoads' attorney in August 1998.

On September 28, 1998, Sommer sent notice of his attorney's lien to Rhoads and to counsel of her former employer. Sommer asserted a right, pursuant to Md. Code (1999, 2006 Cum. Supp.), § 10-501 of the Business Occupations & Professions Article and Md. Rule 2-652, to "a lien on any judgment, award, or settlement" Rhoads may receive in connection with *Rhoads v. FDIC*, Civil Action No. B-94-1548 (D. Md.).

Rhoads proceeded with her appeal largely *pro se*, and the United States Court of Appeals for the Fourth Circuit reversed the District Court on one issue and remanded for a new trial on that cause of action. In December 2002, a federal jury awarded Rhoads damages of $120,006. Rhoads moved for an award of attorney's fees and costs, and Sommer moved to intervene. The federal district court denied both motions.

Sommer filed a complaint in the Circuit Court for Montgomery County, seeking a declaration that his attorney's lien was valid and enforceable against Rhoads' judgment. The Circuit Court held that a plain reading of the retainer agreement indicated that Sommer had waived his right to a statutory lien in the event that he did not obtain a judgment in favor of his client.

Sommer filed a timely appeal to the Court of Special Appeals. The Court of Special Appeals held that Sommer did not waive his right to an attorney's lien in the retainer agreement, that the attorney's lien was not extinguished in bankruptcy, and that Rhoads' procedural due process rights were not violated. Rhoads filed a petition for writ of certiorari, which we granted.

Held: Affirmed. Maryland's statutory attorney's lien states that "an attorney at law has a lien on: (1) a cause of action or proceeding of a client of the attorney at law from the time the cause of action arises or the proceeding begins . . ." § 10-501. The Court of Appeals held that the plain language of § 10-501 establishes a lien from the inception of a cause of action, and nothing in the language of the parties' retainer agreement could reasonably be interpreted to mean that Sommer waived his right to assert a statutory attorney's lien.

The Court of Appeals held also that Sommer properly asserted his right to a lien in accordance with Md. Rule 2-652, as required by § 10-501 (d). Under Md. Rule 2-652, "[a]n attorney who has a lien under [§ 10-501] may assert the lien by serving a written notice by certified mail or personal delivery upon the client and upon each person against whom the lien is to be enforced." Rule 2-652 does not require an attorney to perfect the lien within a particular time or before a bankruptcy proceeding. Thus, Sommer's lien was created before Rhoads filed her bankruptcy case, and, as an *in rem* claim, the lien survived the bankruptcy discharge even though Sommer did not assert the lien by providing notice in accordance with Rule 2-652 until after the bankruptcy discharge. Furthermore, Rhoads' procedural due process rights were protected because Md. Rule 2-652 provides for notice and an opportunity to be heard. Md. Rule 2-652 (b) and (c).

Lori Denise Rhoads v. Fred S. Sommer, et al., No. 127, September Term, 2006, filed August 27, 2007. Opinion by Raker, J.

***

ATTORNEYS - ATTORNEY DISCIPLINE - CONFLICT OF INTEREST WITH FORMER CLIENT - COMMON INTEREST DOCTRINE INAPPLICABLE - AN ATTORNEY'S FIDUCIARY DUTY TO PROTECT A FORMER CLIENT'S CONFIDENCES IS A BROADER OBLIGATION IN AN ATTORNEY DISCIPLINARY MATTER THAN THE EVIDENTIARY RULE GOVERNING ATTORNEY-CLIENT PRIVILEGE

ATTORNEY DISCIPLINE - MISCONDUCT - AN ATTORNEY VIOLATES MRPC 8.4(c) BY MAKING AN INTENTIONALLY FALSE STATEMENT, OR ONE HE OR SHE KNOWS TO BE FALSE, RATHER THAN ONE THAT MERELY IS THE RESULT OF A MISTAKE OR MISUNDERSTANDING

Facts: The Attorney Grievance Commission, acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action against William L. Siskind alleging violations of Maryland Rules of Professional Conduct ("MRPC") 1.4, 1.7, 1.8, 1.9, 1.15, 8.1, and 8.4(c) in connection with his transactions involving a business associate named Frank Zokaites. Before the hearing on the allegations, Attorney Grievance Commission abandoned all charges save the alleged violations of MRPC 1.9 and 8.4(c). The hearing judge conducted an evidentiary hearing on the Petition and rendered findings of fact and recommended conclusions of law, which stated his determination that Siskind committed the ethical violations alleged. The following facts, found by the hearing judge, were the predicate for those violations.

On February 15, 2004, Siskind filed a complaint in the Circuit Court for Baltimore City "individually and as attorney for Transamerican Commercial, Ltd.," ("TCL"), against 101 Charles, LLC ("101 Charles") and Zokaites, seeking to enforce the terms of a contract executed on September 15, 2004, which conveyed ownership of 101 Charles from TCL to Zokaites. The entity, 101 Charles, was formed in July 2002 for the purpose of renovating and marketing an office building in downtown Baltimore known as the Jefferson Building.

The hearing judge concluded that Siskind formerly represented 101 Charles as its attorney from the entity's inception in July 2002 until September 15, 2004. Because Siskind formerly represented 101 Charles, the hearing judge determined that Siskind violated MRPC 1.9 when he initiated the contract suit on February 15, 2005 against his former client.

The hearing judge found the first of two violations of MRPC 8.4(c) based on Siskind's misrepresentation that he had not received a loan from Frank Zokaites. In March 2002, Zokaites and Siskind entered into a Collateral Agreement, which provided for a loan of $151,550 to Siskind to enable Siskind to satisfy a lien on a New Mexico investment property. Contradicting the Collateral

Agreement, however, was a Promissory Note dated March 20, 2002 indicating that the borrower of the $151,550 was TCL. Further, a mortgage, dated April 4, 2002, securing the $151,550 loan, named TCL as the mortgagor.

The hearing judge believed this discrepancy to be a deliberate attempt by Siskind to obscure who was the true obligor of the loan. As support for this conclusion he indicated that Siskind, when drafting and signing legal documents, generally uses his name and TCL interchangeably. Thus, it was not a mistake or oversight when Siskind used his own name as the borrower in the Collateral Agreement. At other times, however, Siskind was more precise in using his name or that of TCL. Furthermore, Siskind made inconsistent statements about the identity of the loan recipient regarding the New Mexico property.

Accordingly, the hearing judge concluded that Siskind personally borrowed money from Zokaites. In a April 5, 2004 deposition of him taken in the course of his personal bankruptcy case, however, Siskind stated, "I have not personally borrowed any money from Mr. Zokaites." The hearing judge concluded that Siskind knowingly testified falsely under oath when he stated that he never personally borrowed money from Zokaites.

The second violation of MRPC 8.4(c) stemmed from a determination by the hearing judge that Siskind testified falsely at the deposition in his personal bankruptcy case that he represented Zokaites as counsel. The hearing judge disbelieved Siskind's explanation that his testimony was incorrect and the result of confusion related to his advanced age. Therefore, Siskind failed to prove by a preponderance of the evidence his defense of mistake. Siskind never served as Zokaites's attorney.

Siskind filed exceptions to the hearing judge's findings of fact and conclusions of law.

Held: Disbarment. Exception to violation of MRPC 8.4(c) relating to obligor on the loan sustained, all other exceptions overruled. The Court found clear error in the hearing judge's conclusion that Siskind was the recipient of the loan from Zokaites. The Promissory Note and mortgage indicated clearly that TCL was the recipient of the loan. This arrangement contradicted the Collateral Agreement because after the Agreement was drafted, Zokaites requested that Siskind restructure the transaction in order to substitute TCL as the recipient of the loan.

The Court overruled Siskind's two other exceptions. Siskind first argued, unsuccessfully, that his former representation of 101 Charles and the contract action against his former client were not

substantially related. In particular, Siskind contended that Bar Counsel failed to prove that there was a substantial risk that information confidential to 101 Charles was utilized by Siskind in his later suit against 101 Charles. The hearing judge's findings were supported by the requisite quantum of proof.

Siskind also argued unsuccessfully that by virtue of the "common interest doctrine," any confidential information he may have attained by virtue of formerly representing both 101 Charles and TCL may be wielded against 101 Charles in a subsequent suit against it by TCL. The Court opined that the "common interest doctrine," which states that confidential information divulged by co-clients to a shared attorney loses its confidential nature when litigation arises between the former co-clients as the result of a breakdown in their common interest, was inapplicable. The Court reasoned that the ethical duties to protect the confidences of former clients and avoid conflicts of interest are broader than the evidentiary privilege on which the common interest doctrine is based. Further, the Court held that Siskind improperly "changed sides" in a substantially related matter.

The Court rejected Siskind's purported distinction between select other rules of attorney conduct that require a showing that a lawyer knowingly made a false statement and MRPC 8.4(c), which Siskind contended is violated only when the knowingly false statement is made *with the intent to deceive or mislead*. Common sense dictates that a person who knows that his or her statement is false necessarily has the intent to deceive. The "intent" element that Siskind imagined to be the missing ingredient in Bar Counsel's allegations and proof against him meant only that "in order to establish its case against [an attorney], Bar Counsel is required to prove with clear and convincing evidence that [the attorney's] supposed false statements were made with the *knowledge* that such statements were false when he made them." In other words, the misrepresentation must be made by an attorney who *knows* the statement is false, rather than the product of mistake, misunderstanding, or inadvertence.

The Court concluded that disbarment was the proper sanction given the well-settled rule that acts of dishonesty, fraud, or misleading behavior often warrant disbarment. Neither the hearing judge nor the Court found any mitigating circumstances.

Attorney Grievance Commission of Maryland v. William L .Siskind, Misc. Docket AG No. 22, Sept. Term 2006. Filed August 24, 2007. Opinion by Harrell, J.

***

CONSTITUTIONAL LAW — FOURTH AMENDMENT — SEARCH AND SEIZURE

Facts: On October 14, 2003, Officer Charles Haak made a routine traffic stop of a vehicle, driven by Patterson, for failing to stop at a stop sign and for operating a vehicle with an inoperative brake light. During the stop Officer Haak detected the odor of burnt marijuana. When he attempted to conduct a pat-down search of Patterson, Patterson fled on foot. At one point during the ensuing chase Officer Haak lost sight of Patterson. The chase ended when Patterson was taken to the ground by Officer Haak. According to Officer Haak, a black, Uncle Mike's Sidekick holster was recovered from the ground underneath Patterson. On October 15, 2003, Officer Haak and three other officers returned to the scene. They spoke with an eyewitness, Christopher Lauer who had observed the chase the day before. The eyewitness had lost sight of Patterson at the same point in the chase as Officer Haak. The police officers searched the area. No gun was found; however, Lauer, who was in the wooded area being searched at the same time as the officers, found a small silver magazine. According to Officer Haak, the size of the magazine corresponded with that of the holster allegedly found under Patterson the day before. Police then began surveillance of Patterson and his two brothers. Based on this surveillance, police concluded that Patterson was temporarily living in a motel room rented by his brother. On November 17, 2003, thirty-four days after the incident in question, Officer Haak applied for a search warrant to search the motel room for a firearm or evidence of firearm ownership. When the warrant was executed, crack cocaine, marijuana, and drug paraphernalia were recovered from the motel room.

On November 20, 2003, Patterson was charged with possession of cocaine, possession with intent to distribute cocaine, possession of marijuana, and possession of paraphernalia. The Circuit Court refused to suppress the evidence seized during the execution of the search warrant and ultimately convicted Patterson. On appeal, the Court of Special Appeals affirmed the lower court concluding that there was a substantial basis for the issuing judge to determine that sufficient probable cause existed to issue the search warrant. Because the Court of Special Appeals concluded that there was sufficient probable cause, it did not apply the Fourth Amendment exclusionary rule. On December 6, 2006, the Court of Appeals granted certiorari.

Held: Affirmed. The search warrant was based on an affidavit that failed to establish probable cause that Patterson was keeping a gun in the motel room rented by his brother. However, because the officers executing that warrant were entitled to rely on a judge's determination of probable cause, pursuant to the *Leon* good faith doctrine, the evidence was properly admitted.

Patterson v. State, No. 83, September Term, 2006, filed August 24, 2007. Opinion by Greene, J.

***

CRIMINAL LAW - WAIVER OF RIGHT TO COUNSEL - MARYLAND RULE 4-215(a) MAY BE SATISFIED WHERE A DEFENDANT, WHO PRAYS A JURY TRIAL IN THE DISTRICT COURT, THUS TRANSFERRING THE CASE TO THE CIRCUIT COURT, RECEIVES ALL APPLICABLE ADVISEMENTS AND INQUIRIES, ALBEIT IN A PIECEMEAL AND CUMULATIVE FASHION ACROSS MULTIPLE APPEARANCES IN THE DISTRICT AND CIRCUIT COURT.

CRIMINAL LAW - WAIVER OF RIGHT TO COUNSEL - ABUSE OF DISCRETION - TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT DEFENDANT WAIVED BY INACTION HER RIGHT TO COUNSEL WHERE THE RECORD SHOWS THAT DEFENDANT APPEARED WITHOUT COUNSEL NUMEROUS TIMES BEFORE THE COURT, DEFENDANT DID NOT EVINCE ANY CONFUSION REGARDING HER RIGHTS AS THE RESULT OF THE METHOD OF RECEIVING THE ADVISEMENTS UNDER RULE 4-215(a), THE TRIAL JUDGE INQUIRED INTO THE DEFENDANT'S REASON FOR APPEARING WITHOUT COUNSEL, AND THE COURT DETERMINED THAT THE DEFENDANT'S EXCUSE WAS WITHOUT MERIT.

Facts: On June 25, 2004, Montgomery County Police Officer James Geary was driving home on Route 15 in Frederick County. Officer Geary observed a vehicle, with its headlights unlit, traveling directly towards him in his lane of traffic. He swerved to the right in order to avoid a head-on collision. He subsequently called for assistance from Frederick County law enforcement personnel, made a U-turn, and followed the vehicle. As he pursued the vehicle, Officer Geary observed the car narrowly miss other vehicles in oncoming traffic and saw its headlights flickering on and off. Eventually, the car pulled into the parking lot of a townhouse development. Geary approached the vehicle and identified Lorinda Ann Broadwater as the driver. She admitted to him to drinking at a bar that night.

Within minutes, Frederick County Deputy Sheriff Chris Schreiner arrived on the scene. He observed that Broadwater's eyes were watery and bloodshot and that an odor of alcohol emanated from

her vehicle. The Deputy attempted to administer standard field sobriety tests, but Broadwater, who had difficulty keeping her balance, could not perform the tests as instructed. A preliminary breath test revealed that she had a breath alcohol content of .19. As a result, Deputy Sheriff Schreiner placed Broadwater under arrest.

Later that same day, Broadwater was charged in the District Court of Maryland, pursuant to that court's exclusive original jurisdiction over the charges, with negligent driving, failing to illuminate headlights, driving under the influence of alcohol, and driving while impaired by alcohol. She was taken promptly before a District Court Commissioner and received copies of the charging document and a Notice of Advice of Right to Counsel.

Approaching three months later, on September 21, 2004, Broadwater appeared, without counsel, for trial before the Honorable Janice Ambrose of the District Court. At this initial appearance, Judge Ambrose confirmed that Broadwater had received copies of the charging documents and informed her of the specific charges levied against her and the maximum penalties for each crime if convicted, in accordance with the provisions of Maryland Rule 4-215(a)(1) and (3). Broadwater subsequently prayed a jury trial and her case was transferred to the Circuit Court.

Broadwater appeared on October 8, 2004 at an initial hearing in the Circuit Court for Frederick County, before the Honorable John H. Tisdale, again without counsel. In addition to setting a trial date of November 8, 2004, Judge Tisdale described to her her right to be represented by counsel and the importance of having a lawyer, and advised Broadwater further of the possibility that a further appearance without counsel might result in the court finding that she waived her right to counsel by inaction, thus, in conjunction with Judge Ambrose's advisements, satisfying the required advisements pursuant to Rule 4-215(a)(2) and (5).

On November 8, 2004, Broadwater, yet again without counsel, appeared before the Honorable Theresa M. Adams for trial. Due to a previously-scheduled trial to which Judge Adams was committed and a shortage of other judges available on that day to try Broadwater's case, Broadwater's trial was continued to January 24, 2005. Before concluding the proceeding on November 8, Judge Adams stressed to Broadwater the "right to and importance of counsel" and the "potential for waiver by inaction" portions of the required Rule 4-215(a) litany relative to the new trial date. On January 24, 2005, when Broadwater appeared for trial before the Honorable G. Edward Dwyer, Jr., she again was without counsel. Judge Dwyer ordered a three-week postponement and set a new trial date for February 14, 2005.

On February 14, 2005, Broadwater appeared before Judge Tisdale for trial. After an inquiry into the reasons why Broadwater was present in Circuit Court for the fourth time without counsel, Judge Tisdale found that she had waived, by inaction, her right to counsel under Maryland Rule 4-215(d) and proceeded to trial. Broadwater represented herself.

At the conclusion of trial, the jury convicted Broadwater on all counts. After merging the lesser included offense of driving while impaired into the conviction for driving while under the influence, Judge Tisdale sentenced Broadwater to six months in jail for the driving under the influence of alcohol conviction, suspending all but thirty days. The Court also fined her $750 for driving while under the influence of alcohol and $100 each for the convictions of negligent driving and failure to illuminate headlights.

Represented by the Office of the State Public Defender, Broadwater appealed to the Court of Special Appeals. The Court of Special Appeals affirmed the judgments of the Circuit Court for Frederick County, concluding that Maryland precedent and the specific language of Rule 4-215 suggested that the piecemeal advisement situation appearing on this record satisfied the requirements of Rule 4-215(a). *Broadwater v. State*, 171 Md. App. 297, 909 A.2d 1112 (2006). The Court reasoned that the Rule does not require a unified set of advisements at a single hearing at which one judge provides each and every of the required Rule 4-215(a) advisements. Rather, the "combined salvo of inquiry and information" provided by Judges Ambrose, Tisdale, and Adams, on September 21, 2004, October 8,2004, and November 8, 2004, respectively, satisfied the advisements due Broadwater. The Court of Appeals granted Broadwater's petition for writ of certiorari.

Held: Affirmed. The Court first examined each of Broadwater's appearances before the District and Circuit Courts and determined that, at various points, she received each of the required advisements in Maryland Rule 4-215(a), namely (1), (2), (3), and (5), with (4) being inapplicable because waiver was found through Broadwater's inaction pursuant to sub-section (d) of the Rule. In the District Court, Broadwater was advised of her rights under (a)(1) and (3), but did not receive the (a)(2) oral advisement on the record concerning the right to and importance of counsel or the (a)(5) oral advisement detailing the potential for waiver by inaction upon a repeated appearance in court without counsel. At her first Circuit Court hearing, however, Judge Tisdale supplied the missing requirements of Rule 4-215(a) and completed the litany of advisements pursuant to (a)(2) and (5). He did not repeat the advisements that had been given at the District Court (neither the charges nor the maximum permissible penalties had changed).

Relying on *Gregg v. State*, 377 Md. 515, 833 A.2d 1040 (2003), the Court of Appeals first explained that Rule 4-215(a) could be satisfied on a piecemeal basis by two different judges of a Circuit Court, over the course of two separate hearings, so long as a defendant received each and every on-the-record advisement required by the Rule through the combined efforts of the two Circuit Court judges. *Gregg*, 377 Md. at 554, 833 A.2d at 1063. The Court then examined the Court of Special Appeals's reasoning in *McCracken v. State*, 150 Md. App. 330, 820 A.2d 593 (2003), which held that advisements given by the District Court may be credited towards satisfaction of the requirements of Rule 4-215(a) when the Circuit Court considers whether waiver occurred, where a defendant appears in District Court, pursuant to that Court's exclusive original jurisdiction, without counsel, and prays a jury trial. 150 Md. App. at 355, 820 A.2d at 608 (relying on *Moore v. State*, 331 Md. 179, 184, 626 A.2d 968, 970 (1993)). The Court rejected Broadwater's reliance on *Johnson v. State*, 355 Md. 420, 735 A.2d 1003 (1999), distinguishing that case on the basis that the defendant had appeared before the District Court strictly for a preliminary bail review hearing and not pursuant to that court's exclusive original jurisdiction, unlike the defendants in *Gregg*, *McCracken*, and Broadwater here.

Synthesizing the reasoning and holdings in these cases, the Court of Appeals determined that, so long as the Circuit Court did not possess exclusive original jurisdiction over the charges, and a defendant's case is transferred from the District Court to the Circuit Court as the result of a jury trial demand, the requirements of Rule 4-215(a) may be fulfilled in piecemeal, cumulative fashion by advisements rendered by judges of the District and Circuit Courts. The Court further noted that, when enacting Rule 4-215(a), the Rules Committee's intended that a judge could rectify those gaps in the Rule 4-215 litany left by his or her predecessors in a case and still find effective waiver. *Bowers v. State*, 124 Md. App. 401, 412, 722 A.2d 419, 425 (1999). Finally, the Court emphasized that adopting Broadwater's argument would render nugatory or meaningless phrases in the Rule such as "if the record does not disclose prior compliance." Md. Rule 4-215(d).

Turning to Broadwater's situation, the Court determined that the requirements of Rule 4-215(a) had been met satisfactorily. Broadwater appeared initially in the District Court pursuant to that court's exclusive original jurisdiction, prayed a jury trial, thus transferring the case to the Circuit Court, and received each and every of the on-the-record advisements due under Rule 4-215(a). The Court recognized the potential for confusion on the part of a defendant resulting from a serialized approach to compliance with the Rule, but explained that this potential could be protected

against in the case-by-case analysis of each record where waiver is found. Because Broadwater's record did not evidence any actual confusion, the Court held that she had received adequately the advisements due under Rule 4-215.

After examining a series of cases in which defendants argued that the trial judge, by finding waiver, had abused his or her discretion, the Court determined that Judge Tisdale did not abuse his discretion when he found that Broadwater waived by inaction her right to be represented by counsel at trial. Judge Tisdale examined Broadwater's offered explanations as to why she had appeared numerous times in court without counsel, asked her about the problems she perceived with the State's particular discovery responses, and determined that, in light of the fact that she had approximately five months in which to retain an attorney after first being told of the importance of counsel, she effectively waived her right to counsel by inaction. Because these actions satisfied sub-section (d) of Rule 4-215 and Broadwater had been repeatedly advised of the potential for waiver by inaction through numerous appearances in court without counsel, the Court rejected Broadwater's contention that Judge Tisdale abused his discretion by finding waiver by inaction.

Lorinda Ann Broadwater v. State of Maryland, No. 123, September Term 2006, filed September 13, 2007. Opinion by Harrell, J.

***

ZONING - PROPERTY UNDER COMMON OWNERSHIP - PERMITTED USES - STORMWATER MANAGEMENT (SWM) - SWM FACILITIES, AS AN ANCILLARY USE, ARE CONTEMPLATED BY THE ZONING SCHEME DESPITE THE LACK OF THEIR EXPRESS INCLUSION AS "USES" IN THE PERMITTED USE ENUMERATIONS IN THE ZONING ORDINANCE.

ZONING LAW BALTIMORE COUNTY - EUCLIDEAN SPLIT-ZONED PROPERTY UNDER COMMON OWNERSHIP - INTERIOR ACCESS ROADS - PLACEMENT OF THE ACCESS ROAD DID NOT VIOLATE THE RESOURCE CONSERVATION PROVISIONS OF THE ZONING ORDINANCE WHERE THE ROAD SERVES IDENTICAL PERMITTED USES IN BOTH THE R.C. 2 AND R.C. 5 ZONES.

Facts: Dorothy Surino and Jeanne Gough, the land owners and their selected developer, Gaylord Brooks Realty Company, submitted to Baltimore County a proposed development plan for the construction of seven single-family detached dwellings. Under the "Rural Protection and Resource Conservation" ("R.C.") area zoning in the Baltimore County Zoning Regulations ("BCZR"), §§ 1A00.1 - 1A09.8, the Property and immediately adjacent parcels of land are subject to various development requirements aimed at agricultural, watershed, critical area, and rural resource preservation. The proposed site is a Euclidean split-zoned parcel, meaning that it is traversed by a zoning boundary line. One portion of the tract is in Baltimore County's R.C. 5 (Rural-Residential) zone, while the remainder is in the R.C. 2 (Rural-Agricultural) zone. The primary relevant difference between the them is that the R.C. 5 zone permits greater density in terms of single-family detached dwellings within the zone.

Vehicular access to the otherwise land-locked lots, according to the development plan, is to be provided by a private road leading into the interior of the R.C. 5 zoned land. The access road enters the proposed subdivision in the R.C. 5 zone, crosses briefly the R.C. 2 zone, and then back into the R.C. 5 zone, where it eventually terminates in a cul-de-sac. The design and location of the interior access road follows generally the existing natural topography of the Property.

Also at issue was the placement of a stormwater management ("SWM") facility on the R.C. 2 zoned section of the Property which, according to the record, is intended to accommodate stormwater runoff from the R.C. 5 lots and surrounding areas. Section 4-204 of the Environment Article of the Maryland Code (1982, 2007 Repl. Vol.), when construed in conjunction with Baltimore County Code §§ 33-4-104(b), 32-6-107, 32-4-410(c), and 33-4-101 to 33-4-116, mandates that, unless the proposed development qualifies under a set of enumerated exceptions in the Baltimore County Code (none applicable here), no proposed land development in the County may commence unless the developer/landowner obtains from the local government approval of a stormwater management plan. The SWM facility in the present case is proposed to be located entirely within the R.C. 2 zoned land, adjacent to the private access road.

The Baltimore County Zoning Commissioner and Board of Appeals approved the proposed development. Petitioners, neighbors of the proposed development, sought judicial review in the Circuit Court for Baltimore County, challenging whether a proposed stormwater management ("SWM") facility and private residential access road, the former designed primarily to serve new single-family residential construction on lots in Baltimore County's R.C. 5 zone and the latter serving those lots and a lot in the R.C. 2 zone,

both may be placed on the R.C. 2 zoned portion of the split-zoned tract. The Circuit Court reversed, holding that placement of the SWM facility on the R.C. 2 portion of the development violated existing zoning regulations. The Circuit Court, however, found no zoning problem with regard to the access road. The Court of Special Appeals, in an unreported opinion, reversed-in-part and affirmed-in-part the judgment of the Circuit Court, holding that there existed "no zoning impediments" whatsoever to the development plan. The People's Counsel of Baltimore County, along with Long Green Valley Community Association, filed with this Court a timely Petition for Writ of Certiorari. It was granted.

Held: Affirmed. Respondents posited initially that construction and operation of a SWM facility "is not a use within the contemplation of the zoning regulations" because the management of stormwater is not addressed as such in the enumeration of permitted uses in the BCZR in the R.C. 5 or R.C. 2 zones. Rather than constituting a "use" in and of itself, Md. Code (1982, 2007 Repl. Vol.), Environment Article, § 4-204; Baltimore County Code § 33-4-104(b), Respondents contended that, because development regulations and zoning laws are separate, but interrelated bodies of law, the SWM facility, at least under the circumstances of the present case, falls outside regulation by the BCZR, notwithstanding Petitioners' assertion to the contrary.

The Court noted that, while zoning regulations and subdivision controls regulate different aspects of the land use regulatory continuum, the two regulatory schemes are intended to complement each other in terms of the safety, health, and general welfare of the community at large. Zoning regulations and subdivision/development controls, along with the establishment of a master plan in a particular locality, serve additional common objectives in terms of the effective, efficient, and consistent use of land within similarly-situated districts, especially when Euclidian zones, such as the R.C. zones, are concerned.

Nowhere in any of the relevant cases explaining the differences between zoning and subdivision regulation is there an indication that improvements required by a subdivision regulation may be placed anywhere the developer wishes, regardless of an improvement's location relative to internal zoning boundaries and their requirements. Respondents' interpretation that a SWM facility is not contemplated by, and therefore not subject to the BCZR generally and the R.C. 2 and R.C. 5 regulations specifically, when required in conjunction with single-family residential permitted use, defies logic and common sense because, at the same time, it is required by the subdivision controls as a condition of approval of that subdivision. Nonetheless, when an infrastructure improvement ancillary to an otherwise permitted residential

subdivision is required as a condition to county approval of the development plan, some flexibility is implied in the definition of the "uses" which are subject to the zoning regulations of the county, particularly when certain other provisions of the same zoning regulations, despite the absence from the enumeration of the permitted "uses" in the particular zone of the particular "use," contemplate specifically that utilization of the land. *See generally* BCZR §§ 1A07.8.C.1; 1A08.6.C.1; 1A09.7.C.1 (contemplating, in other provisions of the resource conservation zoning regulations, the construction and placement of SWM facilities despite their lack of absence as "uses" in the BCZR).

Regarding whether it was proper to approve the SWM facility's proposed location, the entire purpose in requiring adequate stormwater management is "to protect, maintain, and enhance the public health, safety, and general welfare by establishing minimum requirements and procedures to control the adverse impacts associated with increased stormwater runoff." This coincides, to some degree, with one of the stated purposes of the BCZR resource conservation zones to "[p]rotect both natural and man-made resources from the compromising effects of specific forms and densities of development." BCZR § 1A00.2.B.

The record reflects that the SWM facility design was based on the topography, the location of impervious surfaces on the Property, and achieving a pre-development rate of stormwater runoff after development. The CBA determined that "if the SWM facility were located in the R.C. 5 zone, that change would result in more uncontrolled or unmanaged runoff." Although runoff directed to the SWM facility will originate primarily in the R.C. 5 zone, the runoff originating from the R.C. 2 portion of the road will flow additionally into the SWM facility, such that the facility is ancillary to the single-family dwellings in both the R.C. 5 and R.C. 2 lots, which are uses permitted of right in both zones.

Based on the evidence in this record, if the Commissioner and CBA, charged with interpreting the resource conservation provisions of BCZR, chose to place emphasis on the environmental impacts associated with placement of the SWM facility, a conclusion based on those environmental impacts to approve the development plan was not unreasonable or irrational. The CBA's conclusion also is reasonable considering that the BCZR provisions relating to the overall resource conservation zoning scheme contemplate expressly the provision of SWM facilities, to be sited according to topographical considerations.

Turning to the access road, the R.C. 2 and R.C. 5 zoning regulations do not conflict where there is evidence on the record that the road is designed to service identical permitted uses in

both zones. In the present situation, each zone allows single-family, detached residential dwellings as primary uses permitted as of right. Streets and ways are permitted as of right in both zones in order to provide access to major roads for the purposes of ingress and egress. While *Leimbach Construction Co. v. Mayor and City Council of Baltimore*, may be said to support the proposition that "each zone is designed and structured with uniformity and to be self-contained with respect to principal and accessory uses," we find nothing in the BCZR, the subdivision regulations, or our precedents indicating that, when a split-zoned property, in which both portions are under common ownership when developed, is to contain infrastructure improvements ancillary to permitted uses consistently allowed in both zones, the relative infrastructure must be located entirely within the more densely-developed zone.

People's Counsel for Baltimore County, et al. v. Dorothy Surina, et al., No. 111, September Term, 2006, filed August 23, 2007. Opinion by Harrell, J.

***

COURT OF SPECIAL APPEALS

CONSTITUTIONAL LAW – RIGHT TO PRIVACY – CONFLICT BETWEEN PATIENTS' RIGHT TO PRIVACY IN MEDICAL RECORDS VS. GOVERNMENT AGENCY'S RIGHT TO SUBPOENA INFORMATION AS PART OF PHYSICIAN INVESTIGATION IS DECIDED BY A BALANCING TEST

ADMINISTRATIVE LAW - STANDARD OF REVIEW – LEGAL CONCLUSIONS OF AGENCY FOR DETERMINING WHETHER PHYSICIAN MUST RELEASE PATIENTS' MEDICAL RECORDS IS A QUESTION OF LAW THIS COURT REVIEWS *DE NOVO*.

Facts: The Maryland State Board of Physicians received a written complaint against Harold Eist, M.D., a licensed psychiatrist, alleging that he was over-medicating three patients: the complainant's estranged wife (Patient A) and two of their children (Patients B and C). At the time, the complainant and Patient A were litigants in an acrimonious divorce, in which Dr. Eist had submitted an affidavit supporting Patient A's claim for custody.

The Board issued a subpoena *duces tecum*, commanding Dr. Eist to produce "a copy of all medical records of" the three patients. When Dr. Eist informed the patients of the subpoena, they invoked their federal constitutional right of privacy in the information in their records. Dr. Eist communicated that fact to the Board, as did counsel for the patients. Neither the Board, Dr. Eist, nor the patients instituted any legal proceeding to enforce or quash the Subpoena.

Eleven months later, the Board charged Dr. Eist with failing to cooperate with a lawful investigation conducted by the Board, in violation of Md. Code (1981, 2000 Repl. Vol., 2004 Supp.), section 14-404(a)(33) of the Health Occupations Article. It again demanded that he produce the subpoenaed records. Dr. Eist informed his patients (and their counsel) of the charge, asked whether they still were invoking their privacy rights, and stated that, unless he heard from them to the contrary, he would assume that they were not doing so. When neither the patients nor counsel objected to the records being disclosed, Dr. Eist turned the patients' records over to the Board.

Ultimately, a peer review evaluation of the over-medication allegation was favorable to Dr. Eist, and he was not charged with a standard of care violation. Nevertheless, the Board pursued the failure to cooperate charge. The charge came before an Administrative Law Judge who made a summary recommendation in favor of Dr. Eist. The Board rejected that recommendation and found Dr.

Eist guilty of the charge.

In an action for judicial review, the Circuit Court for Montgomery County reversed the Board's decision and remanded the matter to the ALJ for further proceedings. After a contested case hearing, the ALJ made findings of fact and conclusions of law, again recommending a disposition in favor of Dr. Eist. The Board again rejected that recommendation. In a second action for judicial review, the circuit court reversed the Board's decision and found Dr. Eist not guilty of failing to cooperate. The case at bar is the Board's appeal from that judgment.

Held: Judgment of circuit court affirmed. An agency's right to obtain a medical record, as conferred by the Medical Practices Act, codified in HO sections 14-101 et seq., is not absolute. The Court of Appeals in *Doe v. Maryland Board of Social Work Examiners*, 384 Md. 161 (2004), and the Court of Special Appeals in *Dr. K. v. State Board*, 98 Md. App. 103 (1993), adopted a balancing test for determining when a patient's federal constitutional right of privacy in psychiatric records must yield to the needs of a government agency. These factors were first collated and applied by the Third Circuit Court of Appeals in *United States v. Westinghouse Electric Corp.*, 638 F.2d 570 (3rd Cir. 1980). These factors are: the type of record requested, the information it contains, the potential for harm in subsequent nonconsensual disclosure, the injury in disclosure to the relationship for which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the government's need for access, and whether there is an express statutory mandate or other public interest mitigating towards access.

An appellate court reviews an agency's legal conclusions *de novo*. Nevertheless, we give considerable weight to an agency's interpretations and applications of statutory or regulatory provisions that are administered by the agency. *State Board of Physicians v. Bernstein*, 167 Md. App. 714, 751 (2006).

The Board was incorrect in asserting that, under statutory and constitutional law, the government agency's right to obtain medical records as part of an investigation is absolute. When Patients A, B, and C asserted their constitutional rights to privacy after being notified of the subpoena by Dr. Eist, the Westinghouse balancing test must then be applied.

It is apparent from the *Doe* and *Dr. K* opinions that the Westinghouse balancing analysis is the proper method to assess the constitutional significance of the underlying facts, and therefore it is a question of law to be decided *de* novo by a reviewing court. While we recognize the Board's own assessment of its need for the

subpoenaed records, the ultimate determination of whether the Board's need is compelling and outweighs the patients' privacy interests is a question we decide *de* novo.

We hold that the Board did not have a compelling interest in obtaining the records, for purposes of investigation, that outweighed the patients' asserted federal constitutional interests in having the information in their psychiatric records remain private. The Board was seeking to access psychiatric records of a very private nature that could cause embarrassment if disclosed. The request was not limited in scope or timing. The author of the complaint received by the Board was a father/husband embroiled in bitter divorce proceedings with Patient A; in addition, the complaint's allegations lacked specificity and objectivity. Thus, while the government had some need to investigate, the complaint's allegations were immediately of suspect credibility. While some safeguards to protect the information existed, the complainant still could have potentially accessed the records, causing further harm to Patients A, B, and C. Accordingly, this Court holds that Dr. Eist was under no obligation to disclose the requested records after Patients A, B, and C invoked their respective rights to privacy.

We also note that, even if our Westinghouse analysis had affirmed the Board's decision that its interests outweighed those of the patients, that would not mean that Dr. Eist necessarily had failed to cooperate with a lawful investigation of the Board. As long as the doctor acts in good faith in withholding the records until the patient withdraws his privacy rights objection, or a reviewing court makes the requisite Westinghouse analysis, the physician is not failing to cooperate with a lawful investigation of the Board.

Maryland State Board of Physicians v. Harold I. Eist, No. 329, September Term 2006, filed September 13, 2007. Opinion by Eyler, Deborah S., J.

***

CORPORATIONS AND ASSOCIATION - CORPORATION LAW -- ACTION AGAINST CORPORATION BY SHAREHOLDER FOR UNJUST ENRICHMENT -- ACTION AGAINST MAJORITY SHAREHOLDER BY MINORITY SHAREHOLDER FOR BREACH OF FIDUCIARY DUTY -- BUSINESS JUDGMENT RULE -- CLEAN HANDS DOCTRINE -- RIGHT TO JURY TRIAL IN UNJUST ENRICHMENT CLAIM -- REVISORY POWER OF COURT TO LOWER JUDGMENT OBTAINED IN VIOLATION OF CLEAN HANDS DOCTRINE.

Facts: This case came to the Court of Special Appeals from the Circuit Court for Prince George's County. The appellant, Mark Mona, is the 49.4% owner and former President of Mona Electric Group (MEG), one of the appellees. The other appellee, "Cap" Mona, is the appellant's father and the founder, current president, 50.6% owner, and chief executive officer of MEG. After his termination as an officer and director of MEG, Mark filed suit against MEG for wrongly failing to declare a dividend; he amended his complaint as an allegation of unjust enrichment when it did declare a dividend, but deducted Mark's debts from the distribution. The deductions consisted of personal advances made to Mark, money owed to MEG by Peak Traders and Mona Energy (businesses owned by Mark), and related interest. Mark also charged Cap with breach of fiduciary duty for alleged overcompensation. His derivative action against Cap and another individual defendant was voluntarily dismissed. Finally, he sought declaratory relief finding that MEG improperly made the deductions from his share of the dividend distribution. MEG counterclaimed that Mark breached his fiduciary duty, as well as a contract binding him to repay advances to the company upon receipt of a dividend distribution.

The circuit court granted MEG's motion for summary judgment with regard to the breach of fiduciary duty claim, holding that Cap's compensation was determined by the Board of Directors and protected by the business judgment rule, and that Mark failed to rebut that presumption. Other claims were disposed of on motions for judgment, leaving only the unjust enrichment count for the jury, which found in favor of Mark. The jury awarded Mark an amount equaling the deductions taken from his dividend distribution. MEG moved for judgment notwithstanding the verdict, which the court granted in part, subtracting from Mark's damages the amount of an advance to Mona Energy that Mark allegedly personally had guaranteed. Mark asserted at trial that he did not guarantee the advance but that he did take advantage of a tax deduction associated with doing so. Therefore, the court concluded that the doctrine of clean hands barred him from recovering on that amount.

On appeal, Mark contended that the circuit court erred in reducing the jury award and that there was sufficient evidence for his breach of fiduciary duty claim against Cap to go to the jury.

MEG and Cap raised three appeal issues: they argued that Mark's claim for unjust enrichment was equitable and should have been decided by the court; that Mark was judicially estopped from raising his unjust enrichment claim; and that post-judgment interest should have accrued from the date of the judgment notwithstanding the verdict, not from the date of the original verdict.

Held: Affirmed. Judgment was properly granted to Cap on Mark's breach of fiduciary duty claim because it failed as a matter of law. Mark failed to rebut the presumption created by the business judgment rule. Also, the claim should have been brought as a derivative action on behalf of MEG, not Mark personally. The circuit court properly applied the clean hands doctrine in reducing Mark's damages. Mark did not acquiesce in the court's reduction of his damages by demanding and accepting payment of the adjusted amount. Although Mark's original claim for a dividend to be declared was one in equity, his amended claim was for monetary damages and thus was properly decided by a jury. Judicial estoppel is inapplicable to this situation when claims made pursuant to the same contract were mutually exclusive because two separate instances of litigation were not involved. When a jury award is reduced pursuant to a partially granted judgment notwithstanding the verdict, post-judgment interest begins to accrue when the original judgment is entered on the verdict.

Mona v. Mona Electric Group, Inc., No. 2609, September Term, 2006, filed September 13, 2007. Opinion by Eyler, Deborah S., J.

***

COURTS AND JUDICIAL PROCEEDINGS - CIVIL ACTION – PROCEDURE - WAIVER AND RETRACTION OF OBJECTION

CIVIL ACTION – JURY – WHEN JURY RETIRES TO CONSIDER VERDICT, ALTERNATE JURORS ARE TO BE DISCHARGED. ABSENT A RULE CHANGE, ALTERNATES MAY NEITHER LISTEN TO JURY DELIBERATIONS NOR BE SUBSTITUTED FOR REGULAR JURORS ONCE THE JURY RETIRES TO CONSIDER A VERDICT.

CIVIL ACTION – JURY – WHEN THERE WAS NO AGREEMENT BETWEEN ALL PARTIES AND THE COURT THAT ALTERNATE JURORS WERE TO BE RETAINED AFTER THE JURY RETIRED TO DELIBERATE, DEFENDANT AGREED (WHILE PLAINTIFF DISAGREED) TO RETENTION, AND THERE WAS NO EXPRESS DISCUSSION OF SUBSTITUTION OF ALTERNATES FOR DELIBERATING JURORS, COURT RULED, ERRONEOUSLY, THAT RETENTION AND SUBSTITUTION WERE PERMITTED BY RULE, AND DEFENDANT TIMELY OBJECTED TO THE SUBSTITUTIONS BEFORE THEY WERE MADE, DEFENDANT DID NOT GENERALLY WAIVE HIS RIGHT TO CHALLENGE THE CIRCUIT COURT'S SUBSTITUTION OF ALTERNATE JURORS FOR DELIBERATING JURORS.

Facts: On November 14, 2003, Joyce Grimstead, the appellant, filed suit against McNeal Brockington, M.D., the appellee, for negligently failing to diagnose and treat her cancer of the retroperitoneum. Grimstead prayed for a jury trial. After *voir dire*, a jury of six regular jurors and four alternates was seated. On November 9, 2005, at the close of all the evidence, six regular jurors and two alternate jurors were still seated. The trial court proposed that the two alternate jurors be allowed to "sit somewhere in the corner" during jury deliberations but not participate so that if a regular juror was excused, one of the alternates could take his place. Grimstead objected. Brockington affirmatively stated that he did not object. The court overruled Grimstead's objection and directed the regular and alternate jurors according to the court's proposal.

After two days of deliberations, the jury was deadlocked: three to three. Juror number 4 asked to be excused due to a medical condition verified by a doctor's note. Brockington attempted to retract his waiver of the court's plan for regular and alternate jurors and objected both to the alternate jurors' witnessing the deliberations and to the proposed substitution of an alternate juror for juror number 4. After Brockington's objection, juror number 5 also asked to be excused due to a medical condition. The court overruled Brockington's objection, excused jurors 4 and 5, and instructed the two alternates to participate in the deliberations and the verdict. The court did not instruct the newly altered jury to start over in its deliberations. Brockington renewed his objection, citing Maryland Rule 2-512(b) and *Stokes v. State*, 379 Md. 618 (2004), for the proposition that "an alternate juror who does not replace a juror shall be discharged when the jury retires to consider its verdict." The court overruled the objection. Shortly thereafter, the jury found for Grimstead and awarded her $4,414,195 in damages, which the court reduced to $1,959,195.

Brockington noted a timely appeal.

Held: Reversed and remanded for new trial.

The Court of Special Appeals assumed, without deciding, that objections to a violation of Maryland Rule 2-512 could be waived by a litigant.

Brockington effectively revoked his waiver of objection to the substitution of alternate jurors for regular jurors after the jury had begun deliberations. Principles of equitable estoppel apply when counsel seeks to revoke a waiver of objection. Brockington did not effectively revoke his previous consent to the alternate jurors' listening to deliberations. At the time of his revocation and objection, the alternate jurors already had started listening to jury deliberations. The potential damage of jury contamination had occurred; it was too late to revoke the waiver. However, Brockington did effectively revoke his consent and object to the substitution of jurors 4 and 5 for alternates because Brockington revoked his waiver and objected before the substitution actually occurred. Grimstead did not demonstrate other prejudice from Brockington's revocation. Brockington's revocation was not an illegitimate ploy to manipulate the jury process as in *State v. Jones*, 270 Md. 388, 396 (1973), but a sound exercise of advocacy to obtain the best jury possible for his client's interests within the bounds of the law. Accordingly, Brockington's objection to the substitution was preserved for appeal.

The trial court erred by allowing alternate jurors to listen to jury deliberations and by replacing a deliberating juror with an alternate juror. Rule 2-512(b) only allows a substitution "before the time the jury retires to consider its verdict" and requires that alternate jurors be discharged at that time. *See Hayes v. State*, 355 Md. 615, 621 n.1 (1999) (pointing out that the standard in both Rule 2-512(b) and Rule 4-312(b) mandating discharge of alternate jurors when the jury retires to consider its verdict is "the same for both civil and criminal cases"); *James v. State*, 14 Md. App. 689, 698-99 (1972).

A presumptive prejudice standard applies when the sanctity of the jury room is breached by allowing alternates to attend or participate in deliberations. *Stokes v. State*, 379 Md. 618, 638 (2004). Once a jury begins deliberating, it ceases to be six individual jurors and becomes an entity unto itself. To insert new members into the jury midstream cannot fail to have some impact on the deliberations. The impact of the substitution in this case is clear: the altered jury broke the deadlock and allowed a quick decision. In addition, no instruction was given to the reconstituted jury charging them to begin again in their deliberations. Thus, Brockington was prejudiced by the court's error, and a new trial is warranted.

McNeal Brockington v. Joyce Grimstead, No. 58, September Term 2006, Filed September 7, 2007. Opinion by Eyler, Deborah S., J.

***

CRIMINAL LAW - HEARSAY - MARYLAND RULE 5-803(B)(4) - STATEMENTS MADE FOR MEDICAL PURPOSE - PATHOLOGICALLY GERMANE.

Facts: Frederick Roscoe Coates was convicted of various sexual offenses committed upon Jazmyne T., the daughter of appellant's former girlfriend. The last acts of abuse occurred in September 2002, but were not disclosed until a year later. Thereafter, in November 2003, the child was examined by a sexual assault pediatric nurse practitioner. At that time, the child made statements implicating appellant. Over Coates' objection, the court admitted the child's statements under Rule 5-803(b)(4), which governs statements for purposes of medical diagnosis or treatment.

Held: Judgment of the Circuit Court Reversed. The court erred in admitting the child's hearsay statements. The child was examined some fourteen months after the last incident. The nurse's questions seemed to have an investigatory purpose, and were not "pathologically germane." Moreover, the eight-year-old child had no physical symptoms or injury at the time of the examination, nor were there any emergent circumstances. Consequently, the child would not have understood that she was being seen for purposes of medical treatment or diagnosis.

Frederick Roscoe Coates v. State of Maryland, No. 1943, September Term, 2005, filed August 30, 2007. Opinion by Hollander, J.

***

CRIMINAL LAW - MOTION TO DISMISS - In the circuit court, when charges have been dismissed, the State may either appeal or seek a new indictment or both so long as the State's action is not deemed to be oppressive and, thus, a possible violation of due process of law.

Md. Code Ann., Cts. & Jud. Proc. (2006 Repl. Vol.) § 2-608; *Serfass v. United States*, 420 U.S. 377, 388, 95 S. Ct. 1055, 1062, 43 L. Ed. 2d 265 (1975); *Blondes v. State*, 273 Md. 435, 443 (1975): In order for jeopardy to attach, a defendant must be put to trial or risk a determination of guilt. The circuit court properly ruled that the specific articulation of the District Court judge that the purpose of the proceeding was to "have [testimony] taken for the court to make a determination on this motion" (to determine whether the required investigation under Cts. & Jud. Proc., § 2-608, a prerequisite to the filing of charges against a police officer, had been conducted), indicated that the hearing on the motion was limited only to a determination of whether the precondition for filing charges had been satisfied, and not to a determination of the guilt or innocence of the police officers. Jeopardy, therefore, did not attach during the proceedings in the District Court.

Facts: Three victims alleged, in their respective application for charges, that they were involved in an altercation with appellants, who were at the time of the altercation, "on duty" police officers. When the case was called before District Court, appellant's counsel informed the court that preliminary matters with respect to the charging documents needed to be addressed and argued that the officers were on duty at the time of the altercation, thereby implicating Section 2-608 of the Courts and Judicial Proceeding Article. In issuing its ruling, the District Court found that the State's Attorney failed to write a recommendation in accordance with § 2-608 and, accordingly, granted appellants' Motion to Dismiss.

The State subsequently filed new criminal informations in the Circuit Court for Baltimore City. The court addressed the propriety of the State's decision to file new criminal informations, rather than appeal the decision of the District Court and heard arguments regarding whether or not jeopardy attached during the District Court's proceeding.

Held: Affirmed. Under Maryland law, the State had the option of appealing the District Court's decision or filing new criminal informations in the circuit court.

The preliminary matter before the District Court addressed whether the statutory prerequisite of charging the officers had

been satisfied pursuant to the Courts and Judicial Proceedings Article. The procedural error did not go to a judicial determination of guilt or innocence and, thus, appellants were never placed in jeopardy or at risk of conviction.

Jack Odem and Michael Brassel a/k/a Mike Brazzell v. State of Maryland, No. 2261, September Term, 2006 and No. 2262, September Term, 2006, decided September 10, 2007. Opinion by Davis, J.

***

CRIMINAL LAW - POSSESSION OF A FIREARM IN RELATION TO A DRUG TRAFFICKING CRIME - UNIT OF PROSECUTION - SENTENCING - CRIMINAL LAW §5-621(b)(1) - SUFFICIENCY OF THE EVIDENCE - POSSESSION WITH INTENT TO DISTRIBUTE CDS.

Facts: Richard D. Handy and several others were arrested during a drug raid that took place in the home of another. The Circuit Court for Wicomico County convicted appellant of numerous drug and weapons charges, including four counts of possession of a firearm in relation to a single drug trafficking offense, in violation of Criminal Law § 5-621(b)(1). As to those offenses, the court imposed four sentences, two of which were consecutive to drug trafficking crime and two of which were consecutive.

Held: Judgment of the conviction and sentences reversed for three counts of possession of a firearms in relation to drug trafficking. All other convictions and sentences affirmed. The court erred in imposing four sentences for possession of the four weapons in relation to a single drug trafficking offense. The Court of Special Appeals determined that the unit of prosecution is the drug trafficking offense, not the firearms. Therefore, there was only one offense for the possession of firearms in relation to a drug trafficking offense. In addition, the Court held that the evidence was sufficient to support the convictions.

Richard D. Handy v. State of Maryland, No. 1072, September Term, 2005, filed August 31, 2007. Opinion by Hollander, J.

***

FAMILY LAW - CHILD SUPPORT - AGE OF MAJORITY - RETROSPECTIVE APPLICATION OF CHILD SUPPORT ORDER TO REFLECT NEW AGE OF MAJORITY IS APPROPRIATE

Facts: The parties' son, a senior in high school turned 18 on September 19, 2005. Just before that date, his mother, appellee, moved for modification of appellant's child support obligation based on the amendment of art 1., § 24 of the Maryland Declaration of Rights. Appellant opposed the modification, asserting that the extension was a retrospective modification of his support obligation, which violated his vested rights under the contract clause of the U.S. Constitution and Maryland Declaration of Rights.

The case was referred by the Circuit Court for Howard County to a family law master who made findings of fact and recommended that the circuit court adopt an order that would extend appellant's support obligation until Adam's graduation from high school, or his 19th birthday, whichever should occur first. The circuit court entered an order adopting the master's recommendations as to the extension of the support obligation.

Held: Affirmed. The Legislature expressed a clear intent that the statute apply retrospectively. The law of Maryland is clear that the obligation to support a child accrues as the child's birth. While the rights of both parents to support previously paid are vested, future child support payments are not free from modification. Parents enjoy no prospective guarantees of their future child support obligation. It was within this framework that the Legislature modified the age of majority. The duty to support one's child cannot be waived by contract and, therefore, the father's right to contract was not impaired.

Bornemann v. Bornemann, No. 816, September Term, 2006, filed September 12, 2007. Opinion by Sharer, J.

***

FAMILY LAW - PATERNITY - DIVORCE DECREE - CHILD SUPPORT - FAMILY LAW § 5-1006; F.L. § 5-1027(c); F.L. § 5-1038(a)(2)(i)2 - ESTATES

& TRUSTS § 1-206(a) - BEST INTERESTS OF THE CHILD.

Facts: More than a decade after the parties' brief marriage, appellant, Patrick Ashley, challenged paternity of a child born to appellee Michelle Mattingly during the parties' brief marriage. Ashley and Mattingly were married on April 18, 1990. Eight months later, on December 11, 1990, Mattingly gave birth to Chase Patrick Ashley. The parties separated on January 18, 1991. The Circuit Court for Wicomico County issued a Judgment of Absolute Divorce on August 20, 1992, granting sole custody of Chase to appellee, with visitation to appellant. Then, in 2004, Ashley began to doubt his paternity of Chase. He obtained his own DNA testing, which established that he is not Chase's biological father. In December of 2004, he filed an action to terminate his child support obligation, and requested a judicial declaration that he is not Chase's biological father. The circuit court granted appellee's motion to dismiss the action.

Held: The Court of Special Appeals vacated and remanded for further proceedings. The Court explained that, under the Maryland Code, paternity may be established pursuant to the Family Law Article **or** the Estates and Trusts Article. Under E.T. § 1-206 (a), a child conceived or born during a marriage is "presumed to be the legitimate child of both spouses." Under F.L. § 5-1027 (c), a man is presumed to be the father of a child conceived during the marriage. Under F.L.. § 5-1006 (a), a proceeding to establish paternity may be initiated at any time before the child's 18th birthday. F.L. § 5-1038 governs modification of a paternity judgment.

The Court concluded that E.T. § applied, because the child was born during the marriage but was not necessarily conceived during the marriage. In the Court's view, the circuit court had discretion to order genetic testing to determine paternity if it first concluded that it is in the best interest of the child to do so. Because the court did not recognize that it had such discretion, it erred.

Patrick Winfred Ashley v. Michelle Marie Mattingly, No. 2169, September Term, 2005. Opinion was filed on filed September 13, 2007 by Hollander, J.

***

ATTORNEY DISCIPLINE

By an Opinion and Order dated August 24, 2007, the following attorney has been disbarred from the further practice of law in this State:

WILLIAM LEIGH SISKIND

*

The following attorney has been replaced upon the register of attorneys in the Court of Appeals of Maryland effective September 7, 2007:

DAVID A. WEISKOPF

*

By an Order of the Court of Appeals of Maryland dated September 10, 2007, the following attorney has been disbarred by consent for the further practice of law in this State:

JAMES PAUL QUILLEN, JR.

*

By an Order of the Court of Appeals of Maryland dated September 10, 2007, the following attorney has been indefinitely suspended by consent, from the further practice of law in this State:

GEORGINA M. MOLLICK

*

The following attorney has been replaced upon the register of attorneys in the Court of Appeals of Maryland effective September 11, 2007:

LINDA SUE SPEVACK

*

By an Order of the Court of Appeals of Maryland dated September 11, 2007, the resignation of the following attorney has been accepted and his name has been stricken from the register of attorneys in this Court:

THOMAS LEE LILLY

*

By an Order of the Court of Appeals of Maryland dated September 11, 2007, the following attorney has been suspended for eighteen months by consent, from the further practice of law in this State:

RICHARD BALDWIN COOK

*

By an Order of the Court of Appeals of Maryland dated September 25, 2007, the following attorney has been suspended for three (3) years, effective May 8, 2007, from the further practice of law in this State:

ALLAN WENDELBURG

*

By an Order of the Court of Appeals of Maryland dated September 25, 2007, the following attorney has been disbarred by consent from the further practice of law in this State:

ROBERT L. KLINE, III

*