Amicus curiarum

VOLUME 22
ISSUE 9 September 2005

A Publication of the Office of the State Reporter

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APPEAL AND ERROR — RIGHT OF REVIEW — PERSONS ENTITLED — PERSONS OTHER THAN PARTIES

Facts: Respondent DeShawn C. shot petitioner Oscar Antonio Lopez-Sanchez in the back, leaving petitioner paralyzed permanently from the chest down. The Circuit Court for Howard County, sitting as the Juvenile Court, adjudicated DeShawn C. a delinquent child.

Petitioner submitted a request for restitution pursuant to Md. Code (2001, 2004 Cum. Supp.), § 11-603 of the Criminal Procedure Article. Petitioner included documentation of economic losses exceeding $21,000, and requested a hearing. The court scheduled a hearing, but postponed it indefinitely at the joint request of DeShawn C. and the State. Eleven months later, without a hearing or notice to petitioner, the court approved a "Consent Order for Restitution" proposed by DeShawn C. and the State, setting restitution at $4,427.50.

Petitioner filed a Motion to Reconsider Order or, Alternatively, to Alter or Amend Judgment, and a Motion for Access to Court Records. He asserted that he had been denied his right to receive notice of court proceedings under § 11-104(e) of the Criminal Procedure Article, and his presumptive right to restitution under § 11-603(b) of the Criminal Procedure Article. He requested that the restitution be increased to $10,000, the statutory limit in delinquency proceedings. The Circuit Court denied the motions on the ground that petitioner was not a party to the delinquency proceeding and did not have standing in the Juvenile Court.

The Court of Special Appeals dismissed petitioner's appeal. The intermediate appellate court held that petitioner had no right to bring a direct appeal under § 12-301 of the Courts and Judicial Proceedings Article because he was not a party to the delinquency proceeding. The court also held that he had no right to seek leave to appeal under § 11-103 of the Criminal Procedure Article, because he was not a "victim of a violent crime" within the meaning of that statute.

Before the Court of Appeals, petitioner argued only that he enjoyed a direct right of appeal under § 12-301 of the Courts and Judicial Proceedings Article.

Held: Affirmed. The Court began by stating that § 12-301 grants a right of appeal only to parties and that victims are not parties to delinquency proceedings. The Court noted that the General Assembly has enacted § 11-103 of the Criminal Procedure Article, addressing the appellate rights of victims, and that the rights granted by that statute do not extend to the victims of

delinquent acts. It further noted that the General Assembly considered and rejected an amendment to § 11-103 that would have brought such victims within the ambit of the statute.

The Court recognized that victims' rights have rightfully received considerable attention in recent years, and that the rights afforded to victims under Maryland's statutes and Constitution should be followed and respected. Nevertheless, if a prosecutor or the trial court does not follow the law with respect to a victim's rights in a delinquency proceeding, the Legislature has not given to the victim the right to appeal that decision.

Oscar Antonio Lopez-Sanchez v. State of Maryland and DeShawn C., No. 43, September Term, 2004, filed July 28, 2005. Opinion by Raker, J.

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ATTORNEYS - MISCONDUCT - MARYLAND RULES OF PROFESSIONAL CONDUCT: INTENTIONAL MISAPPROPRIATION OF FUNDS; MISCONDUCT

Facts: The disciplinary action against Cherry-Mahoi arose out of a client complaint for Cherry-Mahoi's failure to maintain her client's settlement funds in trust. The complaint arose from Cherry-Mahoi's failure to maintain sufficient funds in her trust account to cover the client's medical expenses, as well as her use of the trust account to pay for personal and business expenses, co-mingling her personal with the client's funds in the account, and failing to properly name the trust account.

Held: Disbarred. Cherry-Mahoi violated Maryland Rule of Professional Conduct (Rule) 1.15(b), which requires prompt delivery to third parties of funds the party is entitled to receive, because she was not able to promptly pay the client's medical expenses. This failure to promptly pay also violated Rule 1.3, which requires a lawyer to act with reasonable diligence and promptness in representing a client. That same behavior violated Section 10-306 of the Business Occupation and Professions Article because a lawyer may not use trust money for any purpose other than the purpose for which it was entrusted, and Cherry-Mahoi had withdrawn the trust monies for purposes other than paying the client's medical expenses.

Cherry-Mahoi also violated Rule 1.15(a), which requires that client property in a lawyer's possession be held separate from lawyer's property, by depositing funds from a settlement entered into by her husband and legal fees from her mother into her trust account, thereby commingling personal funds with client funds. Further, Cherry-Mahoi violated both Rule 1.5, which prohibits charging unreasonable fees, and Rule 1.16(d), which prohibits converting client funds and collecting unearned fees, by taking out substantially more funds from the trust account than she was entitled to receive and by failing to inform her client of those withdrawals. Cherry-Mahoi violated Rule 16-609, which prohibits instruments drawn on attorney trust accounts to be drawn to bearer, when she wrote a check to cash from her trust account and for using trust account funds for a purpose other than the purpose for which they were entrusted to her as well as Rule 16-606 when she improperly named her attorney trust account "IOLTA."

Finally, Cherry-Mahoi violated Rule 8.4(a)(b) and (c) by willingly and knowingly misappropriating client funds held in trust and for engaging in conduct prejudicial to the administration of justice. As the Court explained, when an attorney depletes funds that were to be held in trust, absent any extenuating circumstances, such conduct is infected with deceit and dishonesty and must result in disbarment. Because no compelling extenuating circumstances existed for an exception to be made in Cherry-Mahoi's case, the Court imposed the sanction of disbarment.

Attorney Grievance Commission v. Cherry-Mahoi, Misc. Docket, AG No. 45, Sept. Term 2004. Opinion by Battaglia, J.

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CONTRACTS – COMPENSATED SURETYSHIP – CONSTRUCTION PAYMENT BOND

Facts: On November 22, 1999, Clark Construction Group, Inc. contracted with Maryland Economic Development Corporation to serve as general contractor to oversee the construction of the Hyatt regency Chesapeake Bay Resort in Cambridge, Maryland. Clark executed a surety bond (or payment bond) in favor of MEDCO in the amount of $70,864,000.00, which was issued by National Union Fire Insurance Company of Pittsburgh, PA, Federal Insurance Company, and Fidelity and Deposit Company of Maryland. The payment bond secured Clark's obligation to pay subcontractors for all labor, material, and equipment costs necessary to construct the resort should it default or MEDCO fail to make payment to Clark. The bond required that the sureties send an answer to a submitted claim within 45 days after receipt of the claim stating

the amounts that are undisputed and the basis for challenging any amounts that are disputed.

On November 30, 1999, Clark subcontracted with Wadsworth Golf Construction Company of the Midwest to build, for over ten million dollars, and 18-hole golf course and to complete excavation and rough grading work for all buildings, parking lots, and roads located on the resort. Wadsworth completed the construction of the golf course and the required site work sometime before March 2002, and Clark made periodic payments to Wadsworth as MEDCO paid Clark. When the work was completed, Wadsworth unsuccessfully attempted to collect $720,963.45 still owed by Clark. On March 23, 2002, Wadsworth notified the sureties by certified letter of its claim under the payment bond for the amount that Clark had failed to pay. Ten days later, Federal Insurance Company responded with a letter informing Wadsworth that the claim had been forwarded to the lead surety, which later acknowledged receipt of the claim and requested that Wadsworth submit supporting documentation. Upon receiving the materials supporting Wadsworth's claim, the lead surety informed Wadsworth that it was investigating the claim. Wadsworth received no further information from any of the sureties regarding its claim. In November 2002, Wadsworth filed a single count complaint in the Circuit Court for Dorchester County and also filed a motion for summary judgment. On April 28, 2003, after a hearing on the motion and the sureties's opposition thereto, the Circuit Court granted the motion holding that Wadsworth was entitled to the money under the terms of the bond. The Court of Special Appeals affirmed the decision based upon the sureties's failure to answer Wadsworth's claim within the 45 days specified in the bond.

On May 16, 2000, Clark subcontracted with David A. Bramble, Inc. to provide water and sewer piping systems at the resort. Bramble completed the required site work in March of 2002, at which time Bramble unsuccessfully attempted to collect the monies that it believed were outstanding from Clark. On June 14, 2002, Bramble notified the sureties by letter of its claim for payment under the bond. Nearly one month later, Federal responded to Bramble's claim by sending a letter identical in content to that sent to Wadsworth, stating that it forwarded the claim to the lead surety. At some point thereafter, the lead surety requested that Bramble submit materials supporting its claim. On April 22, 2003, Bramble did so. On April 25, 2003, the lead surety informed Bramble by letter that the amount of the claim should be reduced. Bramble received no further correspondence from the sureties regarding its claim until after the suit was filed. At the end of April, Bramble filed a single count complaint in the Circuit Court for Dorchester County against the sureties and filed a motion for summary judgment, which the sureties opposed. In a hearing on June 12, 2003, the Circuit Court granted Bramble's motion for summary judgment and relied on his reasoning in *Wadsworth*. The Court of Special Appeals affirmed for reasons

identical to those in its *Wadsworth* opinion.

Held: Affirmed. The language of the bond requiring the sureties to answer a claim within 45-days enumerating the portions which are undisputed and stating the reasons for challenging the disputed amounts renders the entirety of a claim undisputed where the sureties fail to comply. To read the language as having the opposite effect would cause the provision to be nugatory. The primary purpose of the 45-day period is to better facilitate the timely payment of claims under the bond.

National Union Fire Insurance Co. of Pittsburgh v. David A. Bramble, Inc., No. 150, September Term, 2004. and National Union Fire Insurance Co. of Pittsburgh v. Wadsworth Golf Construction Co. of the Midwest, No. 151, September Term, 2004. Opinion by Battaglia, J.

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CRIMINAL LAW - CONFESSIONS - VOLUNTARINESS - PROMISING TO INFORM A COMMISSIONER OF A SUSPECT'S COOPERATIVENESS IS IMPROPER; TRIAL BY STIPULATED EVIDENCE - A TRIAL COURT MAY NOT PROCEED ON STIPULATED EVIDENCE WHEN MATERIAL FACTS ARE IN DISPUTE

Facts: Petitioner, Shanquon Taylor, was convicted in the Circuit Court for Prince George's County of second degree rape and second degree assault, after a trial based on stipulated evidence contained in a two-page document that set forth the proffered version of events according to the alleged victim of the crimes, along with other facts, and statements made by Taylor. The disputed event occurred at Taylor's apartment, where, while on a "date," the two engaged in intercourse. Taylor later claimed that it was consensual. The victim later claimed that it was non-consensual and the result of Taylor's having threatened her by wrapping a towel around his hand and telling her he had a .38 caliber gun.

About two months later, Taylor was arrested while in North Carolina, and transported to Prince George's County via a seven to eight hour car ride. Upon arrival, Taylor was interviewed by a detective for almost four hours. He was advised of his *Miranda* rights, including the right to remain silent, to which the detective added that "anything you say also can be used for you

...." During the interview, Taylor made it known that he wanted very much to go home and come back again later for trial. In response the detective told Taylor that if he were to be truthful, the detective could make a recommendation to the commissioner that would assist him in deciding whether Taylor would be released or required to post bond.

After trial, Taylor appealed his convictions to the Court of Special Appeals, arguing that the trial court erred by allowing the case to proceed on stipulated evidence when material facts were in dispute and that his statements were taken in violation of *Miranda* and were involuntary under Maryland common law. That court affirmed in an unreported opinion.

Held: Reversed. The Court held that a trial court may not allow a case to proceed on stipulated evidence when 1) material evidence is in conflict, 2) the conflict requires resolution by credibility determinations, and 3) nothing in the record enables the trial court to make those credibility determinations.

The Court also held that the detective's promise to make a recommendation to the commissioner was an improper inducement under Maryland common law, and that Taylor relied on this improper promise when making his statements. His statements, therefore, are inadmissible. Given this holding, the Court found it unnecessary to decide whether there had been a violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966).

Taylor v. State, No. 140, September Term, 2004, filed August 10, 2005. Opinion by Wilner, J.

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CRIMINAL LAW — DISMISSAL OF INDICTMENT — AUTHORITY AND DISCRETION OF COURT — THE TRIAL COURT MAY NOT DISMISS A CRIMINAL INDICTMENT OR OTHER CHARGING DOCUMENT MERELY FOR THE VIOLATION OF A SCHEDULING ORDER.

Facts: The State appealed the decision of the Circuit Court for Montgomery County to dismiss a criminal indictment in response to the State's violation of a pre-trial scheduling order.

Following an altercation with another driver, Petitioner Kareem Wynn was charged with first degree assault, use of a handgun in the commission of a felony or a crime of violence, and transporting a handgun in a vehicle. Wynn was tried before a jury in the Circuit Court and found guilty of transporting a handgun in a vehicle. The jury deadlocked and the Circuit Court declared a mistrial on the other two charges. The court granted the State thirty days to inform the Assignment Office in writing of its intention to retry the two charges.

Forty-five days later, the court held a status conference, and Wynn moved to dismiss the charges. Informed that the State had not adhered to the scheduling order, the court, over the objection of the State, dismissed the charges with prejudice. The State appealed to the Court of Special Appeals. In an unreported opinion, the Court of Special Appeals reversed. The Court of Appeals granted Wynn's Petition for a Writ of Certiorari.

Held: Affirmed. The Court held that a trial court may not dismiss a criminal indictment or other charging document merely for the violation of a scheduling order. The Court rejected Wynn's argument that the trial court could dismiss the charges under the inherent authority of a court to control its docket. The Court reasoned that the interest of society in public safety through the enforcement of criminal laws, as protected by the broad discretion given to the State's Attorneys to prosecute or dismiss criminal charges, outweighed the need of the trial court to exercise control of its calendar and remedy the violation of its order. In reaching this conclusion, the Court was mindful of the precept that inherent authority should be applied in serious matters that conflict with the interests of the other branches of government only in the rarest of circumstances and of the cooperative spirit that guides the relations of the Court with the other branches of government.

Kareem Wynn v. State of Maryland, No. 115, September Term, 2004, filed August 11, 2005. Opinion by Raker, J.

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CRIMINAL LAW - DISQUALIFICATION OF PROSECUTOR - CONFLICT DUE TO FORMER ATTORNEY / CLIENT RELATIONSHIP WITH DEFENDANT

Facts: This case involves a motion for disqualification of an elected State's Attorney who was prosecuting a person he, while a Public Defender, formerly represented in cases unrelated to the present prosecution.

The Circuit Court for Cecil County conducted a jury trial in 2003 for Troy Arness Gatewood who stood charged with three counts of simple possession and three counts of distribution of a controlled dangerous substance (CDS) (cocaine). After jury voir dire was completed, Gatewood, through his assigned Public Defender, moved to disqualify the prosecutor, the recently elected State's Attorney for Cecil County, Christopher Eastridge, Esquire, because Eastridge, while employed as a public defender previously, represented Gatewood in two different matters. During an ensuing bench conference, Eastridge claimed to have no specific recollection of Gatewood or the earlier cases. The trial judge denied the motion.

After empanelling the jury and entertaining opening arguments, the court observed a recess. Upon court reconvening, Gatewood's counsel proffered that electronic records at the public defender's office that he checked during the recess confirmed that Eastridge represented Gatewood in two cases in 1998– a burglary charge (resulting in a nolle prosequi) and a conspiracy to possess CDS (resolved by a guilty plea). The trial judge denied Gatewood's renewed motion to disqualify Eastridge, stating that he did "not see any unfair prejudice" to Gatewood. Gatewood ultimately was convicted by the jury on three counts of distribution of a CDS, under then-Article 27, § 286 (a) of the Maryland Code.

Gatewood appealed to the Court of Special Appeals raising several issues. Of relevance to the present case, the Court of Special Appeals held that the trial judge's refusal to grant Gatewood's motion to disqualify the State's Attorney was not error. *Gatewood v. State*, 158 Md. App. 458, 857 A.2d 590 (2004). The Court of Appeals granted Gatewood's petition and issued a writ of certiorari, *Gatewood v. State*, 384 Md. 448, 863 A.2d 997 (2004), to consider whether the Circuit Court erred in denying the motion to disqualify the State's Attorney.

Held: Judgment affirmed. A decision on a motion to disqualify a prosecuting attorney for an alleged attorney - former client conflict is trusted, in the first instance, to the discretion of the trial court. Absent an abuse of that discretion, an appellate court shall not disturb the trial judge's decision. The trial judge is in a unique position to "sense the nuances" of the circumstances before him or her. *Lykins v. State*, 288 Md. 71, 85, 415 A.2d 1113, 1121 (1980). Where the potential conflict of interest in a criminal case with a former client arises out of a substantially unrelated charge and the trial court makes an appropriate inquiry into potential

prejudice to the defendant in the current prosecution from the risk of disclosure of any confidential information that may have been imparted during the previous representation, but finds none, the court is not compelled to disqualify the prosecutor.

In deciding how to exercise his or her discretion in resolving such a motion, the judge should consider whether: 1) confidential information was disclosed in the prior representation (and the extent of such information); 2) the potential confidential information is relevant to the current prosecution; and 3) such information would be materially adverse to the defendant in the current prosecution. The judge's measured calculation must be made in the context of the entire criminal trial, considering the nuances of timeliness, waiver, the Constitutional rights (if any are implicated) of the defendant, and the State's ability and duty to perform properly its prosecutorial function. *See* Md. Rule of Professional Conduct 1.9; *Lykins*, 288 Md. at 85, 415 A.2d at 1121. Unlike a situation where the prosecuting attorney previously represented the defendant in the same case (and where a *per se* rule of disqualification exists), there is no *per se* rule requiring disqualification in the present situation.

In this case, the trial judge evaluated two proffers from defendant's present counsel regarding two prior representations by the prosecutor four years prior to the current prosecution. Neither prior representation was substantially related to the current prosecution for possession and distribution of a CDS. Even if used for impeachment purposes (it was not), the mere fact of the one prior conviction was a matter of public record. The judge queried the prosecutor if there was any confidential information from the prior cases that the prosecutor could recall that would be relevant to the current prosecution. The judge then weighed the prosecutor's negative reply in the context of the current trial and, finding neither prejudice to the defendant nor a close relationship between the current prosecution and the past representation, exercised properly his discretion to reject the motion to disqualify.

Gatewood v. State, No. 107, September Term, 2004, filed August 15, 2005. Opinion by Harrell, J.

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EMINENT DOMAIN – INVERSE CONDEMNATION – DAMAGES – LOST RENTAL INCOME MAY BE ADMISSIBLE WHEN DETERMINING DAMAGES

EMINENT DOMAIN – JUST COMPENSATION – FAIR MARKET VALUE – THE AWARD OF FAIR MARKET VALUE SHOULD COVER ALL DAMAGES RESULTING FROM THE ANNOUNCEMENT OF THE PUBLIC PROJECT THROUGH THE ACTUAL TAKING

Facts: This case involves a motion in limine granted by the Circuit Court for Frederick County which excluded damages for lost rental income, real property taxes, and carrying costs, in an inverse condemnation case.

In 1987, the State Roads Commission of the State Highway Administration of the Maryland Department of Transportation ("SHA") sent a letter to Reichs Ford Road Joint Venture ("Reichs Ford") informing it that the property that Reichs Ford owned along Urbana Pike in Frederick County, Maryland, then used as a gasoline service station, would be substantially affected by the construction of a new interchange. In that same year Griffith Consumers ("Griffith") entered into a ten-year lease agreement with Reichs Ford, with options to extend, to operate the gasoline service station on the commercially-zoned property. A few appraisals were commissioned by the SHA; however, it did not institute formal condemnation proceedings.

In 1997, the SHA, still intending to pursue the interchange project, approached Griffith to inform it of its entitlement to relocation assistance, as the SHA is required to do by statute. Griffith decided not to renew its lease with Reichs Ford. Griffith, however, did hold over on a month-to-month basis, at a reduced rent, until 30 June 1998. Thereafter, Reichs Ford claimed that it was unable to lease or use the property in any other economically viable way because of the lingering threat of the SHA's taking of the property.

When the SHA persisted in failing to exercise formal condemnation, Reichs Ford, on 31 January 2001, filed in the Circuit Court for Frederick County suit claiming inverse condemnation in that the actions of the SHA deprived Reichs Ford of all economically viable use of its property and Reichs Ford was therefore entitled to just compensation for lost rental income and other related damages accruing since Griffiths vacated the property.

On 8 March 2001, the SHA instituted formal condemnation proceedings in the Circuit Court to acquire the subject property. Sometime thereafter, Reichs Ford and the SHA initiated settlement negotiations regarding all pending claims related to the property. Reichs Ford proposed two alternatives. In the first, Reichs Ford and the SHA would settle both the inverse condemnation claim and the eminent domain action for $1,535,000. In the second, Reichs Ford proposed to settle only the eminent

domain action for $1,325,000 and would continue to litigate the inverse condemnation claim. In a letter, dated 19 June 2001, the SHA chose the second option. The parties executed an Agreed Inquisition in the eminent domain action calling for $1,325,000 in damages.

After the parties engaged in discovery in the inverse condemnation suit, the SHA filed a motion in limine on 30 January 2003 which sought to exclude any evidence of damages of "lost rental income, real property taxes, etc." The Circuit Court granted the motion in limine based on the reasoning that these types of damages were not recoverable, and therefore were inadmissible as evidence, in an in rem proceeding. The Court of Special Appeals affirmed, in an unreported opinion, holding that if these damages were recoverable at all they should have been included in the award of fair market value for the property in the eminent domain action, as provided in Md. Code (1974, 2003 Repl. Vol.), §12-105 (b) of the Real Property Article. The Court of Appeals granted Reichs Ford's petition and issued a writ of certiorari, 385 Md. 162, 867 A.2d 1062 (2005), to consider whether Reichs Ford was entitled to the damages sought.

Held: Judgment reversed and case remanded for further proceedings.

A written motion must state *with particularity* its premises and relief sought. Md. Rule 2-311 (emphasis added). Because the motion here incorporated the vague term "etc." to describe its request for potentially unlimited broad relief, this Court was left with the untenable task of guessing, to some degree, at the full scope of evidence intended to be excluded.

Even if the vague language were overlooked, the damages sought for lost rental income and real property taxes may be recoverable. In a temporary taking, which is usually the nature of an inverse condemnation claim, it is settled law that one of the proper methods of valuation for the property taken is the potential rental income. *Kimball Laundry Co. v. U.S.*, 338 U.S. 1, 7, 69 S.Ct. 1434, 1438, 93 L.Ed. 1765 (1949). For that reason, Reichs Ford's proffered evidence of lost rental income and related damages should not have been barred pre-trial through the grant of a motion in limine.

At common law the award of just compensation for a total taking of property in eminent domain is the fair market value. That term is defined in common law as the price which a vendor, willing but not obligated to sell, would accept for the property, and which a purchaser, willing but not obligated to buy, would pay. *Pumphrey v. State Roads Comm'n*, 175 Md. 498, 505, 2 A.2d 668, 671 (1938). This price was a measure of the value of the real property in money; therefore, other incidental damages were not included in an award of fair market value. *Shipley v. Baltimore*, 34 Md. 336, 343, (1871).

Intending to broaden the common law notion of just compensation in an eminent domain taking, the Legislature commissioned a study of the losses incurred by property owners when government exercises its power of eminent domain. Report to the General Assembly of 1963, Proposed Bills, Special Committee Reports, vol. 1, 3. The resulting enacted statutory scheme covers in the award of fair market value in an eminent domain taking all diminution in value proximately caused by the public announcements or actions of the condemnor, including those damages sought by Reichs Ford in this case. §12-105 (b), Real Property Art., Md. Code.

Although in the ordinary case this conclusion would result in Reichs Ford's inverse condemnation claim being dismissed because it theoretically received all it was entitled to receive as fair market value in the eminent domain proceeding, Reichs Ford may have an argument for equitable estoppel on this record. Equitable estoppel consists of three elements: 1) a voluntary representation of one party, 2) that is relied on by the other party, 3) to the other party's detriment. *Creveling v. Gov't Employers Ins. Co.*, 376 Md. 72, 102, 828 A.2d 229, 247 (2003). The SHA agreed in its letter to Reichs Ford to accept the offer to settle the eminent domain action for $1,325,000 and impliedly to allow Reichs Ford to continue to litigate its inverse condemnation claim for damages for which damages it apparently may have been entitled to prove and receive under the definition of fair market value in the eminent domain proceeding. How this state of affairs affects the SHA's ability to claim now that Reichs Ford received everything to which it was entitled under §12-105 in the eminent domain action may require some fact-finding which, in the first instance, is committed to the fact-finder. This may be considered by the trial court on remand. The Court of Appeals expresses no opinion whether equitable estoppel, as a matter of law, may be asserted successfully against the SHA, leaving that issue to be addressed by the parties and the trial court on remand.

Reichs Ford Road Joint Venture v. State Highway Administration, No. 137, Sept. Term 2004, filed 12 August 2005. Opinion by Harrell, J.

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INSURANCE — CLAIMS AND SETTLEMENT PRACTICES — CLAIM PROCEDURES — NOTICE AND PROOF OF LOSS — EFFECT OF NONCOMPLIANCE WITH REQUIREMENTS — PREJUDICE TO INSURER — INSURANCE POOLS FORMED BY PUBLIC ENTITIES UNDER MD. CODE (1997, 2002 REPL. VOL., 2004 CUM. SUPP.), § 19-602 OF THE INSURANCE ARTICLE ARE EXEMPT FROM MD. CODE (1997, 2002 REPL. VOL., 2004 CUM. SUPP.), § 19-110 OF THE INSURANCE ARTICLE, WHICH REQUIRES THAT AN INSURER ESTABLISH ACTUAL PREJUDICE BEFORE IT MAY DISCLAIM COVERAGE BASED ON THE FAILURE OF THE INSURED TO PROVIDE NOTICE.

INSURANCE — CLAIMS AND SETTLEMENT PRACTICES — CLAIM PROCEDURES — NOTICE AND PROOF OF LOSS — EFFECT OF NONCOMPLIANCE WITH REQUIREMENTS — PREJUDICE TO INSURER — UNDER THE COMMON LAW, AN INSURER MAY NOT DISCLAIM COVERAGE TO AN INSURED BASED ON THE INSURED'S VIOLATION OF A NOTICE PROVISION, UNLESS THE INSURER SHOWS THAT IT HAS BEEN PREJUDICED BY THE VIOLATION.

INSURANCE—CLAIMS AND SETTLEMENT PRACTICES—CLAIM PROCEDURES—NOTICE AND PROOF OF LOSS—CONTENTS AND SUFFICIENCY IN GENERAL—OF NOTICE—In a declaratory judgment action, the Circuit Court did not err in finding that the County was bound by the notice provisions in the Scope of Coverage and the Endorsement of its excess insurance policy and that the County violated those provisions.

INSURANCE — CLAIMS AND SETTLEMENT PRACTICES — CLAIM PROCEDURES — NOTICE AND PROOF OF LOSS — EFFECT OF NONCOMPLIANCE WITH REQUIREMENTS — PREJUDICE TO INSURER — QUESTIONS OF LAW OR FACT — AN EXCESS INSURER WAS PREJUDICED AS A MATTER OF LAW WHEN THE COUNTY FAILED TO NOTIFY IT OF THE INCIDENT, CLAIM, AND LAWSUIT UNTIL AFTER AN ADVERSE JUDGMENT WAS ENTERED.

Facts: Respondent Local Government Insurance Trust ("the Trust") denied excess insurance coverage to Petitioner Prince George's County ("the County") because the County failed to inform the Trust of the incident, claim, and lawsuit until after the trial.

Freddie McCollum, Jr. and his family filed a civil action in the United States District Court for the District of Maryland against the County and three of its police officers, alleging police brutality. The jury found in favor of McCollum and awarded him damages. The County first informed the Trust of the incident and the suit following the verdict. The Trust disclaimed coverage based on the County's breach of the notice requirements of the insurance policy.

The County filed a declaratory judgment action against the Trust in the Circuit Court for Prince George's County, alleging a breach of contract. Following a hearing, the Circuit Court found that the County had failed to give notice as required by the policy and granted summary judgment in favor of the Trust. The Court of Special Appeals affirmed, holding that the County breached the notice requirement and that the Trust was prejudiced by the breach as a matter of law. The Court of Appeals granted the petition for a Writ of Certiorari.

Held: Affirmed. The Court held that the County violated the notice requirements of the Scope of Coverage and the Endorsement

of the policy. The Court held that the Trust, is an insurance pool formed by public entities under Md. Code (1997, 2002 Repl. Vol., 2004 Cum. Supp.), § 19-602 of the Insurance Article, and is exempt from Md. Code (1997, 2002 Repl. Vol., 2004 Cum. Supp.), § 19-110 of the Insurance Article, which requires that an insurer establish actual prejudice before it may disclaim coverage based on the failure of the insured to provide notice.

The Court then reviewed the common law no-prejudice rule for the first time since the passage of § 19-110. In accordance with the overwhelming weight of authority of courts across the country and the expression of public policy by the Maryland General Assembly as stated in § 19-110, the Court adopted the prejudice rule. The Court held that the Trust was prejudiced as a matter of law when the County failed to notify the Trust until after an adverse judgment was entered. The Court reasoned that the County's delay deprived the Trust of its right under the policy to participate in the investigation, settlement, and defense of the claim.

Prince George's County v. Local Government Insurance Trust, No. 127, September Term, 2004, filed July 21, 2005. Opinion by Raker, J.

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INSURANCE — PROPERTY AND CASUALTY INSURANCE GUARANTY CORPORATION ("PCIGC") — COVERED CLAIMS — PCIGC IS ONLY OBLIGATED TO PAY "COVERED CLAIMS" AS THE TERMS IS DEFINED IN INS § 9-301(D). A "covered claim" is:

> (1) . . . an insolvent insurer's unpaid obligation, including an unearned premium: (I) that: (1)(A) . . . arises out of a policy of the insolvent insurer issued to a resident or payable to a resident on behalf of an insured of the insolvent insurer; (ii) that is presented on or before the last date fixed for the filling of claims in the domiciliary delinquency proceeding as a claim to the corporation or to the receiver in the State; (iii) that: . . . was incurred

or existed before, on, or within 30 days after the determination of insolvency; and (iv) that arises out of a policy or surety bond of the insolvent insurer issued for a kind of insurance to which the subtitle applies.

PCIGC IS OBLIGATED TO PROVIDE COVERAGE FOR A CLAIM PROVIDED THE CLAIM IS AN UNPAID OBLIGATION OF PIE MUTUAL THAT SATISFIES ALL FOUR REQUIREMENTS FOR COVERED CLAIMS.

INSURANCE — PCIGC — COVERED CLAIMS — TIMELY NOTICE TO PCIGC OF AN ACTUAL CLAIM IS NOT TIMELY NOTICE OF ALL POTENTIAL CLAIMS ARISING OUT OF THE SAME EVENT.

Facts: This contribution action arose from a medical malpractice suit brought by Shirley Taylor against Barrett Goldstein M.D. (Dr. Goldstein) and Montague Blundon, III, M.D. (Dr. Blundon) on January 6, 1995. The malpractice suit arose from a surgical procedure performed in 1992 on Ms. Taylor's hip by Dr. Blundon, while Dr. Goldstein assisted in the surgery. On February 20, 1997, the Health Claims Arbitration Panel (Panel) entered an monetary award of $503,189.64 against Dr. Blundon. An award in favor of Dr. Goldstein was entered.

On November 20, 1997, the Circuit Court for Montgomery County confirmed the Panel's determination. Dr. Blundon appealed. The Court of Appeals affirmed the Circuit Court's ruling. *See Blundon v. Taylor*, 364 Md. 1, 770 A.2d 658 (2001). No appeal was taken by either Dr. Blundon or Ms. Taylor regarding the Panel's conclusion in favor of Dr. Goldstein. On April 16, 2002, Dr. Blundon filed the underlying contribution action, HCA No. 2002-177, seeking $312,450 plus costs and interest from Dr. Goldstein. The contribution action has been stayed pending the outcome of this litigation.

After receiving notice of the contribution action, Dr. Goldstein notified Medical Mutual and PCIGC. He sought a defense and indemnification from both companies pursuant to his respective insurance policies. PCIGC denied coverage on the basis that the claim was filed two-and-a-half years after the final bar date established in the PIE Mutual insolvency proceeding and, therefore, the claim was not a "covered claim" within the meaning of INS § 9-301(d)(1). Medical Mutual denied coverage on the basis that the policy Dr. Goldstein maintained with the company was a "claims first made" policy which limits coverage to "claims which are first made against any insured during the policy period for 'incidents' occurring after the Retroactive Date specified in the Declaration." The policy further states that "all claims for damages arising out of any one 'incident' will be deemed to have been made at the time the

first of those 'claims' is first made against any insured." Medical Mutual took the position that, because the underlying medical malpractice suit was the first claim made against an insurer for damages arising out of the treatment of Ms. Taylor, the claim was "first made" in 1995 and, therefore, not covered by its policy.

In March of 2003, Dr. Goldstein filed a declaratory judgment action against PCIGC and Medical Mutual to determine whether either company was obligated to provide him with a defense and indemnification in the contribution action. PCIGC filed a motion to dismiss or in the alternative a motion for summary judgment on the same grounds that it originally denied the claim.

The PCIGC's policy stated that any injury claim first made during the policy period would be covered by this policy, along with any additional damages claims precipitated from the same injury, and "a claim shall be considered to be first made when the company first receives notice of the claim or occurrence." On June 2, 2003, the circuit court denied PCIGC's motion on the basis that the language of the PIE Mutual policy which defined the contribution action as a claim pursuant to the policy, "does have some relevance."

PCIGC filed a motion for reconsideration and Dr. Goldstein filed a motion for summary judgment. After argument by both parties the court granted Dr. Goldstein's motion.

In May of 2004, Dr. Goldstein filed a motion for summary judgment against Medical Mutual. Medical Mutual opposed the motion and filed a cross-motion for summary judgment on the "claim first made" basis discussed above. Medical Mutual argued that Dr. Goldstein should be estopped from taking a position that is inconsistent with the theory that he successfully argued against PCIGC, that the contribution claim was "the same injury" asserted in the medical malpractice action because it was an "additional claim made for damages resulting from the same injury."

On July 6, 2004, the court held that both companies were obligated to provide a defense and to indemnify Dr. Goldstein, and held, "[A]t first glance, [it] seems . . . that under both of those [policy] languages, [] coverage could be found without one [policy] contradicting the other. . . . [T]he fair and appropriate reading of the policy would provide that this is a claim made within the coverage period."

The appeals from both declaratory judgment actions were consolidated into the present action. Prior to consideration of the matter in the Court of Special Appeals, the Court of Appeals

granted *certiorari* on its own motion. *See Medical Mutual Liability Society of Maryland v. Goldstein*, 385 Md. 161, 867 A.2d 1062 (2005).

Held: The Court of Appeals held that based on the plain language of the statute, Dr. Goldstein's claim for indemnification was not a "covered claim" because it was not presented to PCIGC prior to the absolute and final bar date as required by INS § 9-301(d)(1)(ii). Timely notice to PCIGC of an actual claim was not timely notice of all potential claims arising out of the same event. Accordingly, PCIGC was not obligated to provide a defense and to indemnify Dr. Goldstein in the contribution action.

Additionally, the Court held that based on the language of the Medical Mutual policy, Medical Mutual was not required to provide a defense or indemnification to Dr. Goldstein in the contribution action. Although the contribution action was "first made" during the coverage period, January 1, 2002, to January 1, 2003, the first claim against Dr. Goldstein arising out of the injury to Ms. Taylor was made prior to the coverage period. The policy specifically stated that "[a]ll 'claims' for damages arising out of any one 'incident' will be deemed to have been made at the time the first of those 'claims' is first made against any insured." Therefore, the claim was not covered by the policy.

Medical Mutual Liability Insurance Society of Maryland, et al. v. Barrett Goldstein, M.D., No. 134, September Term 2004, filed August 9, 2005, Opinion by Greene, J.

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JUVENILE LAW — CORROBORATION OF ACCOMPLICE TESTIMONY — IN THE INTEREST OF PUBLIC POLICY AND FUNDAMENTAL FAIRNESS, JUVENILES MAY BE ADJUDGED DELINQUENT ONLY UPON TRUSTWORTHY EVIDENCE THAT MEETS THE REASONABLE DOUBT STANDARD. TO THAT END, THE COMMON LAW ACCOMPLICE CORROBORATION RULE, WHICH REQUIRES THAT THE TESTIMONY OF AN ACCOMPLICE BE CORROBORATED BY SOME INDEPENDENT EVIDENCE, APPLIES IN JUVENILE PROCEEDINGS.

Facts: Sometime during the late evening of May 10 and early morning of May 11, 2002, Jose Gonzales, Keith Steers, and Anthony W. were driving around the area of Kemptown Church Road in Frederick County with no particular destination in mind. According to the testimony of Keith Steers, the front seat passenger and one of two witnesses for the State, Anthony W. told Jose Gonzales, the driver, to stop the car in the parking lot of Kemptown Elementary School. After Gonzales stopped the car, Anthony W. exited the car from the back seat and went toward a school bus.

Shortly thereafter, Steers and Gonzales also got out of the car and went to the rear of the school bus, which was about fifteen feet from the car. Steers testified that the respondent entered the bus by breaking the glass in the front door of the bus. According to Steers, Anthony W. smashed a number of windows with a fire extinguisher stored in the bus and sprayed the interior. Steers and Gonzales testified that they entered the bus shortly after Anthony W. and attempted to stop him from breaking additional windows. Neither Steers nor Gonzales broke any windows. They did, however, remove a box of road flares as all three left the bus.

On cross-examination, Steers testified that he had been charged with misdemeanor theft for taking the box of flares from the bus and that the charge was stetted (by State's motion, the trial court may indefinitely postpone trial. Md. Rule 4-248) in exchange for his testimony against the respondent.

The State's second witness, Gonzales, after being advised of his rights, declined to testify until the State entered a "*nol pros* with prejudice"on his theft charge, which also stemmed from taking the box of flares from the bus. After a recess, the State agreed to either enter a *nolle prosequi* with prejudice or dismiss the case with prejudice.

At the conclusion of the State's case, respondent moved for dismissal, alleging that the State's case consisted of the testimony of two accomplices that was not corroborated in any manner. The juvenile court judge denied the motion. The court found that the State's two witnesses were not accomplices for the purposes of the accomplice corroboration rule. In a written order issued the day of the adjudicatory hearing, the court stated that the State had proven "beyond a reasonable doubt" that Anthony W. was involved as alleged for the charge of malicious destruction of property.

In a reported opinion, the Court of Special Appeals reversed the judgment of the Circuit Court. *In re Anthony W.*, 159 Md. App. 514, 859 A.2d 679 (2004). The majority reasoned that, they [the

three youths] drove to the scene and drove around looking for open windows on a bus, from which one may reasonably infer they intended to enter. Finding no easy access, [Anthony W.] broke the door of a bus and entered. The alleged accomplices voiced no objections until the window breaking ensued. The offense was committed when the door was broken open; the window breaking was not a separate offense, it was an acceleration of the illegal activity in which all three were engaged.

In re Anthony W., 159 Md. App. at 519, 859 A.2d at 682. In conclusion, the Court of Special Appeals stated that, "as a matter of sound policy," the rule requiring corroboration of accomplice testimony applies in juvenile proceedings. *Id.* The Court of Special Appeals then held that Anthony W. was wrongly adjudicated as being involved based on the uncorroborated testimony of two witnesses who were, "in [the court's] view" both accomplices.

Held: The rule requiring corroboration of accomplice testimony applies in both criminal and juvenile proceedings. Analyzing the evidence and testimony in the record, a rational trier of fact could have found that Steers and Gonzales were not accomplices. In the absence of a statement relating to why the judgment of the juvenile court was clearly erroneous, the Court of Special Appeals erred by not deferring to the juvenile court judge's factual findings. The Court of Special Appeals decision was reversed and the Court of Appeals held that the Circuit Court, sitting as a juvenile court, was not clearly erroneous in finding that Steers and Gonzales were not accomplices and in relying on their uncorroborated testimony to determine Anthony W.'s involvement.

In Re Anthony W., No. 136, September Term 2004, filed August 1, 2005, Opinion by Greene, J.

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NEGLIGENCE — EXISTENCE OF DUTY — COMMERCIAL MANUFACTURER OF HIV DID NOT OWE A LEGAL DUTY OF CARE TO THE WIFE OF ITS EMPLOYEE.

Facts: Jane Doe filed a tort action against her husband's former employer, Pharmacia & Upjohn Company, Inc. ("Pharmacia") claiming that she had contracted HIV-2 from her husband due to Pharmacia's negligence.

John Doe was exposed to HIV-1 and HIV-2 while working as a laboratory technician for Pharmacia. Jane Doe alleged that her husband contracted HIV-2 through his employment. She alleged further that Pharmacia did not exercise reasonable care in conducting tests on its employees for the viruses and that Pharmacia did not inform its employees that a "false positive" test result for HIV-1 could indicate an HIV-2 infection. As a result of Pharmacia's negligence, according to Jane Doe, she and her husband engaged in unprotected sexual relations and her husband transmitted the disease to her.

Doe filed her action in the Circuit Court for Montgomery County. Pharmacia removed the case to the United States District Court for the District of Maryland. Pharmacia moved to dismiss, and the District Court granted the motion. Doe appealed to the United States Court of Appeals for the Fourth Circuit. That court certified two questions of law to the Court of Appeals: whether Pharmacia owed a legal duty of care to its employees' spouses to exercise reasonable care (1) in conducting testing and (2) in informing the employees of the nature of the test results.

The Court answered the certified questions as follows: Pharmacia did not owe a legal duty of care to the wife of its employee. The Court reasoned that an employer could owe a duty to a third party to inform its employee of the meaning of laboratory test results for the employee's health and the implications of the results for the employee's future conduct only in extraordinary circumstances. The Court noted that such extraordinary circumstances did not exist in this case, because Jane Doe had no relationship with Pharmacia. Additionally, the Court reasoned that Doe's proposed duty of care would encompass an indeterminate class of people, as it would extend to any person who could have contracted HIV-2 from Pharmacia's employees, including through means other than sexual transmission.

Jane Doe v. Pharmacia & Upjohn Company, Inc., Misc. No. 13, September Term, 2004, filed August 11, 2005. Opinion by Raker, J.

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OBSCENITY — OBSCENE PUBLICATIONS, PICTURES, AND ARTICLES — IN GENERAL — THE PHRASE "USE A COMPUTER TO DEPICT OR DESCRIBE" IN MD. CODE (2002, 2004 CUM. SUPP.), § 11-207(A)(3) OF THE CRIMINAL LAW ARTICLE, MEANS TO USE A COMPUTER TO CREATE, NOT MERELY TO USE A COMPUTER TO DOWNLOAD.

OBSCENITY — OBSCENE PUBLICATIONS, PICTURES, AND ARTICLES — IN GENERAL — A PERSON WHO DOWNLOADS ONTO A COMPUTER VISUAL REPRESENTATIONS OF A MINOR ENGAGED IN OBSCENE ACTS OR SEXUAL CONDUCT DOES NOT VIOLATE THE PROSCRIPTION OF MD. CODE (2002, 2004 CUM. SUPP.), § 11-207(A)(3) OF THE CRIMINAL LAW ARTICLE AGAINST THE "USE [OF] A COMPUTER TO DEPICT OR DESCRIBE A MINOR ENGAGING IN AN OBSCENE ACT, SADOMASOCHISTIC ABUSE, OR SEXUAL CONDUCT."

Facts: Petitioner Jonathan George Moore challenged his conviction for the "use [of] a computer to depict or describe a minor engaging in an obscene act, sadomasochistic abuse, or sexual conduct" under Md. Code (2002, 2004 Cum. Supp.), § 11-207(a)(3) of the Criminal Law Article.

Pursuant to a warrant, police searched Moore's home and found computer files and printouts containing child pornography that Moore had downloaded. The Grand Jury for St. Mary's County indicted Moore for the "use [of] a computer to depict or describe a minor engaging in an obscene act, sadomasochistic abuse, or sexual conduct" under § 11-207(a)(3) and for possession of child pornography under § 11-208. In the Circuit Court for St. Mary's County, Moore pled not guilty and proceeded on an agreed statement of facts. The Circuit Court denied Moore's motion for a judgment of acquittal as to the first count, holding that § 11-207(a)(3) proscribes the downloading of child pornography, and found Moore guilty of both counts. Before the Court of Special Appeals considered the case, the Court of Appeals granted certiorari on its own initiative.

Held: Reversed and remanded. The Court of Appeals held that the phrase "use a computer to depict or describe" in § 11-207(a)(3) means to use a computer to create, not merely to use a computer to download. The Court reasoned that the plain language of the statute, including the ordinary usage of "depict" and "describe" and the grammatical form of the statutory phrase, indicated that the statute proscribes the use of a computer to create child pornography. The Court found additional support in the legislative history of the statute.

Jonathan George Moore v. State of Maryland, No. 143, September Term, 2004, filed August 11, 2005. Opinion by Raker, J.

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PREEMPTION - MARYLAND FINDER'S FEE LAW - FEDERAL DEPOSITORY INSTITUTIONS DEREGULATION AND MONETARY CONTROL ACT (DIDMCA)- MORTGAGE BROKERS ARE NOT "CREDITORS" UNDER THE DIDMCA - MARYLAND FINDER'S FEE LAW NOT PREEMPTED UNDER THE DIDMCA

Facts: This case involves the asserted express preemption of the Maryland Finder's Fee Law, Md. Code (1975, 2000 Repl. Vol.), §§ 12-801 - 12-809 of the Commercial Law Article, by 12 U.S.C. § 1735f-7a, the Federal Depository Institutions Deregulation and Monetary Control Act.

Sweeney alleged in the Circuit Court for Frederick County that her mortgage broker, Savings First, extracted a $10,788 mortgage broker's fee for the second of two mortgage loans made within a twenty-four month period, in contravention of the eight percent statutory limitation provided by § 12-804 (b) of the Commercial Law Article. The $10,788 mortgage broker's fee was calculated using the total amount of the second refinance loan ($158,400), rather than on the difference between the earlier loan amount and the second loan amount ($18,150). § 12-804 (c). Savings First moved for dismissal or summary judgment because § 1735f-7a (a)(1) of the United States Code expressly preempted any state from "expressly limiting the rate or amount of interest, discount points, finance charges, or other charges" on qualifying mortgages. The Circuit Court granted the motion for summary judgment.

Sweeney appealed to the Court of Special Appeals. The Court of Appeals granted a writ of certiorari before the intermediate appellate court could decide the case.

Held: Judgment reversed. The express preemption provision of § 1735f-7a(a)(1) applies expressly to a loan or mortgage that meets three requirements: 1) be secured by a first lien on residential real property; 2) be made after 31 March 1980; 3) and be a "federally related mortgage loan" as defined by the National Housing Act (NHA). The express preemption provision of DIDMCA is ambiguous as to whether the preemption applies to all of the parties involved in an otherwise covered mortgage transaction or merely the mortgage itself (and by logical extension, the creditor only).

The legislative history of DIDMCA provides that state interest rate-cap laws, which could force a home mortgage creditor to loan money to homebuyers below the market levels, had contributed to a "severe" mortgage credit crunch. S. Rep. No. 96-368, at 18 (1980); *reprinted in* 1980 U.S.C.C.A.N. 236, 254. At the time of enactment of DIDMCA, it was clear that a mortgage creditor's ability to provide credit was severely restricted by state interest rate-cap laws. Furthermore, a 1982 amendment to the Truth in Lending Act, which is used to define a "federally related mortgage" under the National Housing Act, expressly removed persons who arranged credit (mortgage brokers) from the definition of creditor and limited its provisions solely to

professional lenders of credit. S. Rep. No. 97-536, at 43 (1982); *reprinted in* 1982 U.S.C.C.A.N. 3054, 3097.

Linda R. Sweeney v. Savings First Mortgage, L.L.C., No. 148, September Term, 2004, filed 9 August 2005. Opinion by Harrell, J.

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TORTS - NEGLIGENCE - PREMISES LIABILITY - DUTY OWED BY UNIVERSITY TO STUDENT BATTERED BY DORMITORY ROOMMATE.

Facts: Ennis Clark was a student at the University of Maryland - Eastern Shore ("UMES")during the Spring Semester 1998. Due to his involvement in a fight at a campus dining hall in March 1998, Clark was suspended by UMES. His readmission was conditioned on completion of "professional counseling related to conflict resolution."

Upon tender of proof of participation in such a program, Clark was readmitted by UMES for the Fall 1998 semester, subject to a one-year probationary period. Clark was assigned randomly by UMES to share a dormitory room with another student, Arthur Rhaney. Clark and Rhaney, to that point, were strangers to each other. Shortly after they became roommates, Rhaney learned from sources (not the UMES administration) of Clark's involvement in the March 1998 incident, but took no action to change his room or roommate assignment.

On 29 October 1998, Clark was in the process of moving his belongings to another room that he intended to share with a friend. While Clark was not present, Rhaney and a friend attempted to move Clark's fish tank which had yet to be relocated to Clark's new room. In doing so, they apparently cracked the glass and the tank began to leak. Upon his return to gather his remaining belongings, Clark noticed Rhaney mopping up the leaking water and accused him of breaking the tank, an accusation denied by Rhaney. In a lull in the verbal back-and-forth, Clark punched Rhaney in the face, breaking Rhaney's jaw.

Rhaney filed a complaint in the Circuit Court for Somerset County against Clark and UMES. Of relevance to this case, he alleged negligence on the part of UMES as both landlord and business owner regarding its failure to warn him of Clark's dangerous propensity and/or, based on UMES's knowledge of the March 1998 incident, to take reasonable actions to protect him from Clark.

Judgment by default was entered against Clark on the intentional tort plead against him. UMES's motion for summary judgment based on an alleged lack of duty owed to Rhaney was denied. A jury returned a verdict in favor of Rhaney.

UMES appealed to the Court of Special Appeals. After an en banc hearing, a majority of the intermediate appellate court reversed the judgment of the Circuit Court. *UMES v. Rhaney*, 159 Md. App. 44, 858 A.2d 497 (2004). That court perceived that there was no breach of duty because Clark's prior misconduct was insufficient to establish foreseeability that Clark later would batter his roommate.

The Court of Appeals granted Rhaney's petition for writ of certiorari and UMES's conditional cross-petition. 384 Md. 448, 863 A.2d 997 (2004).

Held: Judgment of Court of Special Appeals affirmed. Under landlord/tenant premises liability principles, UMES owed no duty to Rhaney. Clark's alleged propensity for violence, if such existed, did not constitute a "dangerous condition" because it was not a condition of the physical environment of the dormitory that contributed to or facilitated the commission of the battery committed on Rhaney. Moreover, even if the alleged propensity were a dangerous condition within the meaning of premises liability analysis, the single March 1998 incident was not such as UMES reasonably could be held responsible to foresee that Clark would batter Rhaney in their dormitory in October 1998 and therefore be obliged to act to prevent the latter event.

Although the Court was of the threshold view that principles of business owner/invitee analysis did not govern whether the relationship of UMES and Rhaney as to the dormitory room gave rise to a duty (but rather the Residence Hall Agreement established a landlord/tenant relationship), the Court alternatively concluded that Rhaney had not established a breach of duty under business owner/invitee principles because: (a) Rhaney knew of Clark's role in the March 1998 incident and took no action to protect himself from any perceived threat from his roommate; (b) UMES did not act unreasonably, under the circumstances, in readmitting Clark; and, (c) there was no pattern of prior violence on Clark's part in circumstances

sufficiently similar to what happened to Rhaney from which a duty to foresee and forestall should be visited upon UMES.

In view of Rhaney's inability to prevail on the two theories of recovery advanced by him at trial, the Court did not reach UMES's conditional cross-petition question as to why a special relationship did not exist upon which to predicate a recovery by Rhaney against it.

Arthur F. Rhaney, Jr. v. University of Maryland Eastern Shore, No. 118, September Term, 2004, filed 15 August 2005. Opinion by Harrell, J.

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TORTS - PRODUCTS LIABILITY – SCOPE IN GENERAL – PRODUCTS IN GENERAL – WARNING OR INSTRUCTIONS – PLACEMENT OF THERMAL INSULATION IN DIRECT CONTACT WITH AN ELECTRIC LIGHT FIXTURE DESIGNED ONLY FOR USE WHERE THERMAL INSULATION WOULD BE AT LEAST THREE INCHES AWAY FROM THE FIXTURE WAS IN DIRECT CONTRAVENTION OF WARNINGS ON THE FIXTURE AND CONSTITUTED A MISUSE OF THE FIXTURE, THEREBY BARRING A STRICT LIABILITY CLAIM AGAINST THE MANUFACTURER OF THE FIXTURE.

Facts: While in the process of making extensive renovations to their Chestertown, Maryland home, David and Texie Hoon, respondents, designated that non-IC rated recessed light fixtures be installed in certain areas of their home. Non-IC rated fixtures are commonly used in areas away from insulation and they are not intended for insulation contact, as they present a fire hazard if so placed. The non-IC rated fixtures chosen were manufactured by Lightolier, petitioner, and installed by Westwind Construction Company, a company partly owned by David Hoon that acted as both the general contractor responsible for the renovations to the Hoons' home and as the electrical contractor. Each of the Lightolier non-IC rated fixtures had a warning clearly printed on it which warned of the risk of fire if the fixtures were placed within three inches of thermal insulation. A similar warning was also found on the first page of the instruction manual accompanying each Lightolier non-IC rated fixture.

Attached to each of the Lightolier non-IC rated fixtures was what is known as a self-heating thermal protector ("SHTP"), which was located about three inches from the base of each fixture. The SHTP is designed to detect excessive heat entrapped around the fixture when in use and to turn off the fixture in order for it to cool down. This "cycling" of the light also has the effect of alerting the installer or consumer that there may be a problem with the light that requires inspection. Notwithstanding the addition of SHTPs to non-IC rated fixtures, they remain non-IC rated fixtures and are not considered IC rated (*i.e.*, able to be safely placed near or in direct contact with thermal insulation).

At some time after the non-IC rated fixtures were installed in the Hoons' home, the insulation subcontractor installed blown-in cellulose insulation into the ceiling area where certain Lightolier non-IC rated fixtures had been placed. This insulation was placed in direct contact with these non-IC rated fixtures without regard to the warning labels on those fixtures concerning the risk of fire. On November 2, 1998, a fire caused substantial damage to the Hoons' home. The fire marshal who investigated the fire concluded that it originated above the ceiling where one of the non-IC rated fixtures was placed. Both parties agreed that the fire started because of direct contact between the thermal insulation and the non-IC rated fixture.

On November 15, 1999, the Hoons filed a multi-count complaint in the Circuit Court for Kent County against numerous defendants, including Lightolier. The claims against Lightolier were for negligence, breach of warranty and product liability–defective design. Basically, the Hoons based these claims against Lightolier on allegations that the SHTP of the non-IC rated fixture where the fire originated did not work properly and that this malfunction made Lightolier liable for the damages caused by the fire. Following pretrial discovery, Lightolier filed a motion for summary judgment, claiming that the doctrine of misuse barred the Hoons from recovering. On April 15, 2002, the Circuit Court granted Lightolier's motion for summary judgment, finding that the warnings placed on the Lightolier fixtures and in the instructions were adequate and that the failure to heed these warnings was the proximate cause of the fire.

On appeal to the Court of Special Appeals, the intermediate appellate court held that the Circuit Court erred in granting Lightolier's summary judgment motion, instead finding that there could exist more than one proximate cause of the fire, *i.e.*, in addition to the insulation installer's negligence in failing to heed the warnings and placing thermal insulation in direct contact with the non-IC rated fixtures there existed the

possibility that the fire was in part caused by Lightolier's "defective design (or negligent manufacture) of the SHTPs." Thereafter, Lightolier filed a petition for Writ of Certiorari and, on December 17, 2004, the Court of Appeals granted the petition.

Held: The Court of Appeals held that the placement of thermal insulation in direct contact with a non-IC rated fixture was a misuse of that product, as it was designed for use only where thermal insulation would be at least three inches away from the fixture, and that such misuse barred the Hoons' strict liability action against Lightolier. The Court found this misuse to be obvious in light of the risk-of-fire warnings prominently displayed on the non-IC rated fixtures and in the instruction manuals accompanying those fixtures and that the failure of the thermal insulation installer to heed these warnings when installing the blown-in cellulose insulation was the proximate cause of the fire that damaged the Hoons' home. The Court further found the warnings on the non-IC rated fixtures, as well as the design of the SHTP device on those fixtures, to be in accordance with the National Electric Code, a model code promulgated by the National Fire Protection Association.

Lightolier, A Division of Genlyte Thomas Group, LLC v. David Hoon et al. No. 117, September Term, 2004, filed June 21, 2005. Opinion by Cathell, J.

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COURT OF SPECIAL APPEALS

COUNTIES - LAND PLANNING - ANNE ARUNDEL COUNTY CHARTER, § 604, MARYLAND CONSTITUTION, EXPRESS POWERS ACT, MD. CODE ANNO.,

ARTICLE 25 A, §5(U); RIGHT TO APPEAL FROM COUNTY BOARD OF APPEALS TO COURT OF SPECIAL APPEALS; NOTWITHSTANDING FAILURE OF COUNTY CHARTER TO PROVIDE FOR APPEAL TO THE COURT OF SPECIAL APPEALS, OBVIOUS LEGISLATIVE INTENT TO PROVIDE FOR A RIGHT OF APPELLATE REVIEW OF DECISIONS OF THE BOARD OF APPEALS COMPELS CONCLUSION THAT SUCH RIGHT EXISTS IN ANNE ARUNDEL COUNTY AS IT DOES IN COUNTIES IN VIRTUALLY EVERY OTHER JURISDICTION IN THE STATE IN WHICH CHARTERS HAVE PROVIDED FOR THE RIGHT OF APPEAL TO THE COURT OF SPECIAL APPEALS. *HALLE COS. V. CROFTON CIVIC ASS'N*, 339 MD. 131,142 (1995), *UNITED PARCEL V. PEOPLE'S COUNSEL*, 336 MD. 569 (1994); ANNE ARUNDEL COUNTY CHARTER, § 603, HEARING "*DE NOVO* UPON THE ISSUES BEFORE THE BOARD;" PURSUANT TO THE EXPRESS POWERS ACT, A BOARD OF APPEALS IS PRIMARILY AN APPELLATE TRIBUNAL WHICH REVISES AND CORRECTS THE PROCEEDINGS IN A CAUSE ALREADY INSTITUTED, BUT IT MAY REVIEW THE ACTIONS OF THE ADMINISTRATIVE HEARING OFFICER AND IT MAY TAKE ANY ACTION WHICH THAT OFFICER COULD HAVE TAKEN IN THE ORIGINAL PROCEEDING; BECAUSE A DECISION BY THE ADMINISTRATIVE HEARING OFFICER IS A PREREQUISITE TO PROCEEDINGS BEFORE THE BOARD AND, BECAUSE THE ISSUES OF SCHOOL ADEQUACY AND WAIVER WERE NOT SO INEXTRICABLY INTERTWINED THAT A DETERMINATION OF THE WAIVER ISSUE *IPSO FACTO* ENCOMPASSED A DETERMINATION OF SCHOOL ADEQUACY, THE LOWER COURT ERRED IN ITS CONCLUSION THAT THE "RESOLUTION OF EACH (WAIVER AND SCHOOL ADEQUACY) NECESSARILY REQUIRES CONSIDERATION OF THE OTHER."

Facts: A landowner sought to subdivide her property to create a residential development. She filed with the County's Planning Director a request for a waiver from ordinances requiring adequate public school facilities, and in her filing she conceded that school facilities were inadequate to serve the proposed subdivision. When the waiver request was denied, the landowner took an appeal to the County's Board of Appeals, but before that body she argued that she did not need the waiver because the schools were, in fact, adequate to support her subdivision. The Board of Appeals denied relief, concluding that the question of whether schools were adequate had not been presented to the Planning Director, and, therefore, it declined to decide that issue. The Circuit Court for Anne Arundel County vacated the Board of Appeals' decision, and the County appealed to this Court.

Held: Reversed. Where an applicant petitions a local planning office for a waiver from certain ordinances, expressly conceding and not contesting the necessity of a waiver, the applicant may not later argue, for the first time on appeal to a Board of Appeals, that the waiver was unnecessary after all. The Board of Appeals has no original jurisdiction to pass on such a matter that was not raised before or decided by the planning office.

Anne Arundel County, Maryland v. Jane P. Nes et al., No. 1687, September Term, 2004, decided July 12, 2005. Opinion by Davis, J.

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CRIMINAL - CORAM NOBIS

Facts: On three different occasions between 1996 and 1999, Maurice Andre Parker, appellant, plead guilty to theft over $300[1] in violation of Md. Code (1957, 1996 Repl. Vol.), Art. 27, § 342.[2] On June 18, 2003, appellant filed a petition for writ of error coram nobis naming the State as the defendant. Appellant wished to vacate the convictions entered in the above cases, alleging that he was about to be tried in the United States District Court for the District of Maryland on a charge of felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Under federal sentencing guidelines, appellant contended that he would face an increased sentence of imprisonment because of the prior State convictions. Appellant's only ground for relief rested on his contention that the guilty pleas were not knowing and voluntary.

Appellant waived a hearing on the petition. The circuit court entered orders denying the petitions without further comment.

The State contended that the trial court correctly denied appellant's petition for relief because appellant waived the claims on which he sought coram nobis relief when he failed to raise the allegations according to the requirements of the Uniform Postconviction Procedure Act ("UPPA").[3] Furthermore, the

[1] On April 4, 1996 defendant also plead nolo contendere to carrying a handgun in violation of Md. Code (1957, 1996 Repl. Vol.) Art. 27, § 36B). This provision has been recodified and is now Md. Code (2002), § 4-203 of the Criminal Law Article.

[2] This provision has been recodified and is now Md. Code (2002), § 7-104 of the Criminal Law Article.

[3] Formerly the Post Conviction Procedure Act, Md. Code (1957, 1992 Repl. Vol.), Art. 27 § 645 A (c).

State alleged that coram nobis did not apply because there were no intervening changes or compelling circumstances in the law that merited such relief.

Held: The Court of Special Appeals vacated the order dismissing appellant's petitions for writ of error coram nobis and remanded the case for further proceedings. The Court held that the petitioner's constitutional rights were violated if he did not knowingly and voluntarily enter his guilty and nolo contendere pleas.

A petition for writ of error coram nobis provides a remedy for a person who is not incarcerated and not on parole or probation, but is faced with a significant collateral consequence of his or her conviction, and can legitimately challenge the conviction on constitutional or fundamental grounds.

Coram nobis relief is subject to several requirements. In order to obtain such relief, the petitioner must show that the reasons for challenging the criminal conviction are of a constitutional, jurisdictional, or fundamental character. Secondly, the petitioner must show that he or she is suffering or facing significant collateral consequences from the conviction. Thirdly, the petitioner must show that there is no other statutory or common law remedy available. An individual may not challenge a criminal conviction in a coram nobis proceeding when the issue has been fully litigated, and there have been no fundamental changes to the applicable law or controlling case law.

In a criminal case, an acceptable ground for challenging criminal convictions is the voluntariness of a plea. In the present case, based on the allegations, each of appellant's convictions violated constitutional standards, as well as Maryland Rule 4-242, because they were not entered into knowingly and voluntarily. In order for a guilty plea to be valid, the record must show that the plea is voluntary and that there is a factual basis for the support of the plea. The record must also show that the defendant is aware of the nature of the plea and the consequences of the plea.

In the present case, all three of the hearing transcripts show that appellant was not addressed in any manner about his pleas. In one instance, the court suggested that appellant should be told how to plead because he "doesn't know anything." There is no evidence in the record that appellant was consulted

before pleading guilty or nolo contendere. Appellant's petition satisfied the first requirement for coram nobis relief.

The next requirement is to show that there is no other statutory or common law remedy available. Appellant neither was in jail or on probation when the petition was filed so he could not have challenged his conviction under UPPA or filed a habeas corpus petition. Therefore, the second requirement for relief was met.

The State contended that appellant waived the claim on which he sought coram nobis relief because he failed to raise allegations of error. This argument lacked merit because there are certain constitutional rights that cannot be waived unless done so knowingly and intelligently by the defendant. In the present case, the waiver involved was not a tactical decision by an attorney; it was a surrender of a fundamental right, which must be waived knowingly by the defendant. Appellant's petitions indicated that this standard was not met, and therefore, there was no waiver.

Appellant alleged that he was facing a longer imprisonment sentence under federal sentencing guidelines as a result of his previous convictions and ,therefore, contended that there were significant collateral consequences. This determination will be made by the trial court on remand; however, the Court briefly commented on the merits of this argument. The allegation was sufficient to fulfill the significant adverse consequence requirement, and thus, petitioner stated a cause of action.

In conclusion, appellant's petitions stated a cause of action for coram nobis relief because the appellant's guilty pleas and nolo contendere plea were not entered into knowingly and voluntarily, appellant did not waive the claims on which he sought coram nobis relief, and appellant alleged significant collateral consequences. Therefore, the orders of dismissal were vacated, and the case was remanded for a determination as to whether coram nobis relief was warranted.

Parker v. State, No. 2119, September Term 2003, filed January 27, 2005. Opinion by Eyler, James R., J.

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CRIMINAL LAW - SEARCH AND SEIZURE

Facts: On October 11, 2002, Detective Barnes, an undercover agent posing as a drug buyer, approached appellant to make a purchase. Appellant and Detective Barnes then went to a

residence, where appellant used a key to obtain entrance. Appellant then handed Detective Barnes two capsules from a plastic bag. Detective Barnes paid with departmental currency, and both appellant and Detective Barnes left the house. Detective Barnes then left the area in a car driven by her partner. Detective Barnes informed other officers in the area that she had made the purchase. The arrest team apprehended appellant on the sidewalk near his home, searched him, and then entered appellant's residence and seized a plastic bag, which contained 32 gel caps of suspected heroin, and a bag of marijuana from the table.

Appellant was indicted for distribution of heroin, possession of heroin with intent to distribute, possession of heroin, and possession of marijuana in the Circuit Court for Baltimore City. On June 4, 2003, the circuit court conducted a hearing on appellant's motion to suppress the heroin and marijuana seized from appellant's home. The court denied appellant's motion on the ground that the arrest team had the right to search the appellant's residence based on appellant's initial consent to allow Detective Barnes' entry to his home, referred to as "consent once removed."

After the circuit court denied appellant's motion, the case proceeded to trial. The appellant was convicted on all four counts and sentenced to 14 years' imprisonment for the distribution of heroin. Both heroin possession charges were merged for sentencing purposes, and the appellant was given a one-year concurrent sentence for the possession of marijuana conviction.

The appellant claimed the circuit court erred in denying his motion to suppress the heroin and marijuana seized from his residence. Furthermore, appellant contended that the docket entries and the commitment order should be corrected to reflect the sentence commencement date as determined by the circuit court. The State contended that the motion was rightly denied based on both Baith v. State, 89 Md. App. 385 (1991), and the "consent once removed" doctrine.

Held: The Court of Special Appeals reversed the circuit court's decision and remanded for further proceedings on the basis that the trial court erred in denying appellant's motion to suppress. There are few exceptions to the Fourth Amendment's prohibition against warrantless entries into a person's home, none of which were applicable to the present case.

The only issue to be determined by the Court was whether the arrest team could rightfully and legally enter appellant's home and search the premises after his arrest. The State relied on Baith to uphold the warrantless search and seizure. This

argument was unpersuasive because Baith is distinguishable from the instant case. In Baith, the confidential informant had been extended an invitation to enter into the warehouse, and while still in the negotiation process, she left and returned with police officers who immediately arrested the suspect and searched the building. The Court held that the consent extended to the informant's reentry because it was a continuation of the initial access to the warehouse.

In the case at bar, Detective Barnes had no expectation of returning to appellant's home. She had completed her transaction and completely left the residence before the backup team was informed of the transaction. Detective Barnes's invitation had expired because the purpose in entering the house had been fulfilled. Furthermore, appellant was arrested on the sidewalk, not in his home. Therefore, the search of appellant's home was not justified under Baith.

The "consent once removed" doctrine was not expressly adopted or rejected. The "consent once removed" doctrine states that a defendant who consents to an initial entry of a government agent or informant thereby consents to a second entry by officers called to assist the agent, when the initial agent "(1) entered at the express invitation of someone with authority to consent; (2) at that point established the existence of probable cause to effectuate an arrest or search; and (3) immediately summoned help from other officers." United States v. Akinsanya, 53 F.3d 852, 856 (7th Cir. 1995). This right of reentry is not absolute and by no way implies that one invitation gives government agents the freedom to enter and leave a residence at will. The suspect's forfeiture of privacy is not ongoing. In almost all of the "consent once removed" doctrine cases, the informant was on the premises or retained expressed or implied consent as the backup team arrived to arrest the suspect. Two courts have held that the "consent once removed" doctrine was unsatisfied when the informant or agent was not present at the time the additional officers arrived and searched the home.

In the instant case, there was no right of reentry or any evidence that permission to reenter would have been granted. Detective Barnes and appellant left the residence together once the transaction was complete. Therefore, the "consent once removed" doctrine did not apply.

Furthermore, when the "consent once removed" doctrine is applicable when no right of reentry exists, it only extends to situations where back up was called immediately and the suspect was arrested inside the structure. In this situation, police would be allowed to search the suspect and a portion of the house. Here, appellant was arrested on the sidewalk outside his

residence. Therefore, the search of appellant's home incident to his arrest for the prior transaction with Detective Barnes was unlawful.

The State did not argue at the suppression hearing or on appeal that there were exigent circumstances to warrant the search and seizure. The Court briefly addressed the issue of exigent circumstances because the circuit court raised the issue. It has been established that, when exigent circumstances exist, police officers may search an individual's home without a warrant. Exigent circumstances exist when there is a "strong likelihood" that "the removal or destruction of the evidence is imminent." In the instant case, this standard was not met. Detective Barnes testified that she saw no one else in the home. Appellant stated that there was a hearing-impaired woman residing in the house, but there was no evidence that she had knowledge the drugs existed, let alone that she was currently destroying them.

The Court of Special Appeals held that the State failed to demonstrate that appellant consented to the search of his home by the arrest team. The judgment below was reversed, and the case was remanded for further proceedings.

Smith v. State, No. 1068, September Term 2003, filed September 15, 2004. Opinion by Eyler, James, R., J.

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CRIMINAL LAW - SINGLE LARCENY DOCTRINE - MERGER OF OFFENSES

Facts: A jury in the Circuit Court for Howard County convicted Lawrence Lambert Dyson, Jr., the appellant, on one count of felony theft scheme of property valued over $500 and on three counts of misdemeanor theft of property valued at less than $500. The court sentenced him to 10 years for the felony theft scheme and 18-month consecutive terms for each misdemeanor conviction, all to be served concurrently to the felony theft scheme sentence.

The evidence at trial disclosed that on December 20, 2002, the appellant, a woman named "Tam," a woman named "Ebony," and a man whose name was not disclosed in the record, drove to Michelle Wetmore's apartment in Columbia. Ebony remained in the car while the other three met with Wetmore in her apartment. Tam asked Wetmore if she "wanted to make some money." Wetmore responded, "Yeah," and left with the three. They all got in the car with Ebony and drove to the Patuxent Medical Group building, also in Columbia, and parked nearby.

The appellant entered the lobby of the building, took the elevator to the third floor, walked down a hallway to the gynecology department, and entered it. He then walked through the gynecology department to enter the offices of three female gynecology department employees. Two offices were next to each other; the third was one office away from them.

All three women were away from their offices at lunch, but had left their purses behind. One employees's purse was behind a chair, by the edge of her desk; one was halfway underneath the employee's desk, behind another bag; and the third purse was in a desk drawer. The appellant took credit cards from each woman's purse. About ten minutes after entering the gynecology department, the appellant took the elevator down to the first floor lobby, and returned to the car.

The appellant showed the stolen credit cards to the occupants of the car. The group drove to a gas station, where the appellant tested the credit cards at the pump to confirm that they were valid. They then drove to retails stores around Howard County, including two Target stores, a Wal-mart, a CompUSA, and Rack Room Shoes. The appellant gave Wetmore two of the credit cards and told her to buy Play Station II's. Wetmore, Tam and Ebony used the cards the appellant gave them to make purchases at the stores. The appellant did not enter the stores.

Using one employee's credit cards, the three women charged a total of $3,257.62 in merchandise; using another employee's card, they charged $1,249.35 in merchandise. The group then drove to a pawn shop in Baltimore City, where the appellant pawned the items for cash, and gave Wetmore $300 of the cash he received for the items.

On appeal, the appellant argued that the trial court erred by not merging his three misdemeanor theft convictions into one conviction under the single larceny doctrine. He also argued that the trial court erred by not merging the misdemeanor theft offenses into the felony theft scheme offense for sentencing because they were part of the same theft scheme.

Held: Affirmed. We held that the single larceny doctrine did not apply to three thefts of credit cards taken in rapid succession from purses in separate offices of three victims located in the same area of a business. Under the single larceny doctrine, the stealing of several items at the same time, belonging to different people, ordinarily constitutes one offense. The single larceny doctrine does not apply when the facts clearly would have indicated that separate and distinct thefts were intended and accomplished.

The Court examined cases from other states discussing the single larceny doctrine, and concluded that the evidence supported a finding that the appellant intended and accomplished in rapid succession three separate and distinct thefts. The offices he entered were in separate rooms and were furnished for individual occupancy, obviously separate units belonging to different people. He entered and exited each office one at a time, and located a purse in each office. The items he took clearly belonged to different people: they were credit cards with different cardholders' names on them. Further, the appellant's enlistment of three woman in advance, to use credit cards he had not yet stolen, showed that his objective was to steal credit cards belonging to more than one female person. The Court concluded that the appellant was not acting under a single impulse to steal when he took the credit cards, and thus he was properly convicted on three counts of misdemeanor theft.

The Court also held that the misdemeanor theft convictions did not merge into the felony theft scheme conviction. The appellant's misdemeanor theft convictions were for the theft of credit cards from the three victims. The appellant's felony theft scheme conviction was for theft of the merchandise purchased by Tam, Ebony, and Wetmore by use of the stolen credit cards. The Court observed that the takings comprising the continuing theft scheme were the takings of merchandise from the various retail stores – for which there were no separate theft convictions – not the takings of the credit cards, on which the misdemeanor theft convictions were based. Although committing the misdemeanor theft crimes enabled the appellant to carry out through others the thefts comprising the felony theft scheme, the conduct of stealing a credit card is not the same conduct as obtaining or exerting control over other property by use of the stolen credit card. The sentences imposed for the appellant's felony theft scheme conviction and his misdemeanor convictions did not punish him for the same conduct or transaction.

Lawrence Lambert Dyson v. State of Maryland, No. 2579, September Term, 2003, filed July 13, 2005. Opinion by Eyler, Deborah S., J.

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FAMILY LAW - CHILD CUSTODY - DISPUTE OVER CUSTODY BETWEEN BIOLOGICAL PARENT AND THIRD PARTY - EXCEPTIONAL CIRCUMSTANCES SUFFICIENT TO OVERCOME PRESUMPTION OF CUSTODY IN FAVOR OF BIOLOGICAL PARENT.

Facts: Karen P. and Christopher B. met and became romantically involved in 1992 and that same year moved into a single household. In 1996, Karen gave birth to Sebastian. The parties' relationship then began to deteriorate, and Christopher moved out in early 1999. He continued to visit Sebastian during the separation. After several months, the parties reconciled their differences, and Christopher moved back into the family home.

In December of 1999, Karen gave birth to Claudia. According to Karen, when she read the date of conception on a sonogram report, she knew that Christopher was not the baby's biological father, but instead of telling that man, she ended the relationship with him. During the pregnancy, Karen acted as if Christopher were the baby's biological father; having no reason to think otherwise, Christopher thought he was the biological father. Within 24 hours of Claudia's birth, Karen identified Christopher as Claudia's father on an affidavit of parentage and on Claudia's birth certificate.

Karen, Christopher, Sebastian, and Claudia lived together and functioned as a family. Sebastian and Claudia bonded as siblings, and Claudia and Christopher bonded as father and child. To Claudia, Christopher is her father.

The parties' relationship again began to deteriorate. Christopher left the family home for a few months during the summer of 2003, and visited the children during the separation. In September, after Christopher had moved back into the family home at Karen's suggestion, Karen filed a complaint seeking custody of Sebastian and Claudia in the Circuit Court for Baltimore County. She alleged that she and Christopher were the children's parents. In February of 2004, Christopher filed a countercomplaint seeking custody of the children.

In April, after a heated argument, Karen told Christopher that he was not Claudia's biological father. For that reason, Karen thought a court would grant her custody of both children--to keep them together.

In May, Karen brought a moving van to the family home and removed the furniture and household items. She then picked the children up from school and moved to Avalon, New Jersey. She did not tell Christopher about the move; he found out as Karen was removing items from the home. Karen would not tell him where she was moving or where the children were.

For three months after the move, Karen would not disclose to Christopher her location. She allowed him to speak to the children by phone, but monitored the calls to make sure the children did not discuss their whereabouts. She offered to bring the children to Baltimore for visits, but only if she supervised the visitation. Christopher refused these offers.

Karen conceded at trial that she did not move to Avalon for any particular reason other than she thought it was a nice town. She had no family connections there.

In July, Karen filed a request for DNA testing to determine Claudia's paternity, which the court granted. Karen told Claudia the testing was part of a routine doctor's visit. Two days before trial, the DNA results showed that Christopher could be excluded as Claudia's father. At trial, Karen would not identify Claudia's biological father. As of the time of argument to this Court, Claudia had not been told that Christopher was not her biological father.

Testimony and evidence at trial revealed that Sebastian and Claudia were doing well in school in Avalon. Karen had signed a long-term lease on the house that she and the children had moved into when they first went to Avalon in May of 2004. The house has three bedrooms and plenty of room for the children. On this evidence, the court found that both Christopher and Karen were fit parents, but that exceptional circumstances rebutted the presumption that it would be in Claudia's best interest to be in the custody of Karen, her biological parent. The exceptional circumstances were the strength of the relationship between Claudia and Christopher; Christopher's intense and genuine desire to have custody of Claudia, even though she was not his biological child; the lack of stability and uncertainty of Claudia's future if she were to be in Karen's custody, evidenced by Karen's putting her own interests above the children's by moving them to New Jersey; and that Claudia's paternity had only been challenged when Karen was "getting a leg up" on trying to seek sole custody in the case. Accordingly, the court found that

it would be in the children's best interests to be in Christopher's custody, with visitation for Karen. The court issued an order memorializing its decision, and Karen appealed to the Court of Special Appeals.

Held: Affirmed. The Court of Special Appeals held that the trial court's finding of exceptional circumstances was supported by sufficient evidence and was not clearly erroneous; therefore, the trial court's decision to award custody of the children to Christopher was not an abuse of discretion.

The Court observed that a child's best interests ordinarily will be served by custody in the biological parent. This presumption can be rebutted, however, if the third party seeking custody shows either a lack of fitness on the part of the biological parent or extraordinary circumstances making custody in the biological parent detrimental to the child's best interests. The Court further noted that the non-exhaustive list of exceptional circumstances developed in caselaw includes: the nature and strength of the ties between the child and the third-party custodian; the intensity and genuineness of the parent's desire to have the child; the stability and certainty of the child's future in the custody of the parent; and the possible emotional effect on the child of a change in custody.

The Court found Karen's first argument--that the trial court should have discounted the psychological father/daughter relationship between Claudia and Christopher because Claudia also had a strong mother/daughter relationship with Karen--to be without merit. It concluded that, in the Maryland cases involving custody disputes between a biological parent and a third party, the closeness and relationship between the child and the non-biological parent was of "considerable importance" on the issue of whether exceptional circumstances existed to make an award of custody in the biological parent detrimental to the child's best interests.

The Court also found that the trial court did not err in considering Christopher's intense and genuine desire to have custody of Claudia in making its exceptional circumstances finding. The Court first noted that the factors to consider are not exhaustive. Furthermore, the Court explained that the genuineness of Christopher's desire to have custody of Claudia was relevant because Karen had put her own interests above those of the children, both by interjecting the issue of paternity into the case and by failing to disclose the identity of Claudia's biological father. Accordingly, the Court reasoned, whether Christopher was seeking custody as a responsive litigation strategy, or because of his genuine desire for custody, was part of the complete picture of the case.

The Court also found without merit Karen's argument that the trial court committed clear error in disregarding evidence that she had made a stable home for Claudia in New Jersey. The Court concluded that the trial judge's analysis of stability *vel non* was not limited to material advantages. Rather, it also encompassed the certainty that Claudia would maintain family relationships in the future; the fact that Karen had put her best interests over those of the children when she moved to New Jersey; and the fact that Karen gave no thought to the effect the move would have on the children's relationship with Christopher or other relatives in his family.

Karen P. v. Christopher J. B., No. 2116, September Term, 2004, filed July 11, 2005. Opinion by Eyler, Deborah S., J.

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FAMILY LAW – CHILD CUSTODY AND VISITATION - CIRCUIT COURT JUDGE, WHEN DECIDING ISSUES OF CHILD CUSTODY, CAN IMPOSE, AS A CONDITION TO THE GRANT OF VISITATION, THAT A PARENT ABSTAIN FROM ALCOHOL AT ALL TIMES.

Facts: Maxwell and Stephanie Cohen were married in 1999 but separated in the summer of 2001. A daughter, Candace Lee Cohen, was born of the marriage in 2000.

Although a 2001 marital settlement agreement provided for joint legal custody, Stephanie, in her suit for divorce, sought sole legal custody of Candace, asserting that circumstances had changed since the separation agreement.

At the 2004 trial, Mr. Cohen testified that he had been arrested: (1) in April 2002 for operating a boat while intoxicated; (2) in June 2001 for driving while under the influence; and (3) in June 1999 for possession of drug paraphernalia. But according to a substance abuse assessment entered into evidence, Mr. Cohen had also been arrested in 1997 and 1998 for driving under the influence.

A court-ordered drug test of Mr. Cohen's blood in 2004 was positive for cocaine and morphine.

The Circuit Court for Anne Arundel County ordered that, as a condition of Mr. Cohen's joint legal and physical custody of his daughter, he was to, among other things, refrain from using alcohol, make himself available for urinalysis tests, and pay $1,796 per month in child support. The court's order stated that a violation of the order could constitute a change in circumstances and warrant modification of the custody arrangement.

On appeal, Mr. Cohen claimed that the court had no right to prohibit him from using alcohol as a condition to having joint custody of his daughter. He also contended that child support should not have been changed due to his ex-spouse's failure to show a material change in circumstances. He also contended that in calculating his income for purposes of child support payments the court should have deducted the monies he paid yearly into a 401K plan.

Held: Affirmed. The trial court's decision that the father's right to custody and visitation with his child be conditioned on his abstention from alcohol was reasonably related to advancing the child's best interest. Contrary to Mr. Cohen's contention, there was sufficient evidence to support the circuit court's conclusion that Mr. Cohen was a problem drinker who could not control his alcohol consumption. Inasmuch as Mr. Cohen was granted frequent access to his daughter, it could be concluded legitimately that alcohol consumption of any sort could have an adverse impact upon Candace.

The award of $1,796 in monthly child support was also affirmed. The Court observed that while it is true that a child support award may not be modified absent a showing of a material change in circumstances, here the marital agreement was not an "award" and was not binding on the circuit court when considering the appropriate amount of child support. The Court also held that, for the purpose of calculating gross income under the child support guidelines, no deduction should be made for money voluntarily contributed to a personal retirement account.

Cohen v. Cohen, No. 1993, September Term, 2004, filed June 7, 2005. Opinion by Salmon, J.

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TORTS - DUTY OF INNKEEPER – ESTABLISHING THE DUTY OF AN INNKEEPER TO INVITEES – AN INNKEEPER HAS A DUTY TO TAKE AFFIRMATIVE ACTION TO PROTECT GUESTS FROM AN ATTACK BY THIRD PARTIES IF, IN THE EXERCISE OF DUE CARE, THE INNKEEPER KNEW OR SHOULD HAVE KNOWN THAT THE ATTACK WAS FORESEEABLE WELL ENOUGH IN ADVANCE FOR THE ATTACK TO BE PREVENTABLE.

BIFURCATION – THE TRIAL COURT HAS BROAD DISCRETION TO ORDER THE BIFURCATION OF A TRIAL FOR THE CONVENIENCE OF THE PARTIES OR TO AVOID PREJUDICE.

QUASHING DISCOVERY REQUESTS – IT IS WITHIN THE DISCRETION OF THE TRIAL COURT TO CONCLUDE THAT THE DISCOVERY REQUESTED WILL MOST LIKELY NOT LEAD TO ADMISSIBLE EVIDENCE AND THEREFORE QUASH THAT DISCOVERY REQUEST.

Facts: Appellants, Jennifer Corinaldi and Ronald Corinaldi, parents of Andre Corinaldi, decedent, challenged the trial court's order granting appellees' Columbia Courtyard and Marriott International, Inc. motion for summary judgment. Appellants also argued that the court erred in bifurcating the liability and damages issues and quashing their discovery request for the criminal records of the area surrounding the hotel.

On January 13, 2001, Tanette McMillian hosted a surprise birthday party in two adjoining rooms at a Courtyard by Marriott hotel. Ms. McMillian rented the rooms from a Courtyard employee named Mr. Rock, age 17, a friend of Ms. McMillian's, who testified that he was unaware at the time of the rental of the hotel's policy against parties in guest rooms and furthermore, he was unaware of Ms. McMillian's intention to throw a party.

The guests arrived at various times between 8:00 p.m. and 10:55 p.m., walking through the front lobby or side doors opened by other attendees at the party. There were two hotel employees working during this time: Kristina Brown, age 19, who worked at the front desk, and Mr. M., age 43, who was a long term maintenance and housekeeping employee. Neither employee had received training in hotel safety or security.

Around 9:00 p.m., hotel guests complained about noise and teenagers loitering in the halls. On two separate occasions

after these complaints, Mr. M. knocked on the door of one of the rooms to tell the guests to keep the noise level down and stop letting people in the side door. When no change was observed in their behavior, Ms. Brown called her supervisor, Mr. Knox, who was not on the premises, to ask for assistance. Mr. Knox advised her to ask everyone to leave and end the party. The evidence indicated that Ms. Brown called the room and asked the guests to leave and Ms. McMillian agreed, but more guests continued to arrive after this call.

At approximately 10:35 p.m., an argument broke out between two male attendees. Ms. McMillian separated them by placing one in each room and closed the adjoining door. The men continued to make threats and shout through the door. Around 10:45 p.m., the decedent entered the hotel through the front lobby with a number of friends and proceeded to the party. Upon entering the hotel room, the decedent attempted to calm the individual who was beating on the connecting door. The decedent pulled him away from the door, and at this time, a handgun was fired. The bullet passed through the closed door and struck and killed the decedent.

At approximately the same time, Ms. McMillian went to the front desk to enlist Ms. Brown's assistance because the party was getting out of control and to alert her to the fact that one of the guests had a gun. Ms. Brown ordered Mr. M. to call the police, and Ms. Brown called Mr. Knox. Moments later, a girl came running down the hall screaming that people had been shot in the rooms. A 911 call was placed, and an officer arrived approximately three minutes later.

For purposes of the motion, the trial court assumed that the decedent was an invitee of Ms. McMillian and held that there was no "special relationship" between the hotel and the decedent, and that the hotel only owed the decedent a duty of reasonable care. The court concluded by stating that reasonable care could not have prevented the unforeseeable act of a second degree depraved heart murder. Therefore, as a matter of law, the harm to the decedent was unforeseeable, and even if the hotel acted with reasonable care, the act could not have been prevented.

Held: Reversed, in part and affirmed in part. The trial court's order granting the motion for summary judgment is reversed and remanded for further proceedings. The Court declined to reverse the trial court's decision with respect to bifurcating the issues or in quashing the discovery request.

In general, there is no duty to protect a victim from the criminal acts of a third party in the absence of a contract, statute, or other relationship between the party in question and

third party. The general rule will be affected if there is a special relationship between the party in question and the third party or between the party in question and the injured party. The appellants argue that the hotel had a relationship with the decedent, as an invitee of a hotel guest, that gave rise to a duty to protect him from the criminal acts of the shooter.

Precedent has established that a special relationship that gives rise to a duty of reasonable care exists between an innkeeper and guest. In this case, the decedent was a guest of an invitee and it has generally been held that property owners owe the same duty of care to the guest of an invitee as to the invitee himself. Therefore, the hotel owed a duty of reasonable care to the decedent.

The extent of the landowner's knowledge is relevant to determine the scope of this duty. Usually, a landowner has no duty to protect an invitee from harm until the owner knows or should know that harmful acts of a third party are occurring or about to occur. Affirmative action to protect guests from an attack by third parties is warranted if, in the exercise of due care, the innkeeper knew or should have known that the attack was foreseeable, well enough in advance for the assault to be preventable.

With respect to the given facts, if no jury could reasonably find that the innkeeper knew or should have known that the injury to the decedent was both foreseeable and preventable, then the innkeeper had no duty to take affirmative action to prevent the attack. The most significant piece of evidence in the record was the revelation to Ms. Brown at 10:45 p.m. that one of the guests had a gun. Before this time, there was insufficient evidence to support a finding that the hotel had knowledge that a deadly attack was imminent. Noise violations and hotel policies regarding parties did not imply harmful attacks to guests nor did it imply that there were deadly weapons in the room. However, Ms. Brown was advised of the gun approximately ten minutes before the shooting occurred, and it took only three minutes for the police to respond. This suggested that a reasonable jury could find that the harm was preventable if Ms. Brown had immediately acted when she was told about the gun. The Court reversed the entry of summary judgment and remanded for further proceedings.

Appellants also argued that the trial court erred in bifurcating the liability and penalty phases of the trial because a second jury would not have sufficient context to assess damages.

Maryland Rule 2-503(b) gives the trial court broad discretion to order the bifurcation of a trial for the

convenience of the parties or to avoid prejudice. On remand, if a jury finds defendants liable for the plaintiff's injuries, then the trial judge must use discretion in determining what evidence is relevant and admissible to the damages trial. The Court assumed that the trial court would exercise sound discretion ,and therefore, affirmed the circuit court's order pertaining to bifurcation.

Finally, appellants argued that the trial court erroneously quashed their discovery request for all records from the Howard County Police Department concerning violent criminal activity that happened within a three-mile radius of the hotel. Only prior similar incidents that have occurred on the premises or very close thereto are relevant and admissible in cases in which an individual is attacked by a third person on the land controlled by the defendant. The Court held that it was within the discretion of the trial court to conclude that discovery regarding crimes that did not occur on the premises was not likely to lead to admissible evidence. Furthermore, the appellants' argument centered around the events of the night in question that arguably alerted the hotel employees that an attack was imminent. Appellants do not argue that the hotel owners should have had reasonable knowledge based on the criminal statistics of the neighborhood. Therefore, the Court declined to reverse the circuit court's order granting the appellees' motion to quash.

Corinaldi v. Columbia Courtyard, Inc., No. 1165, September Term 2004, filed May 3, 2005. Opinion by Eyler, James R., J.

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TORTS - STATUTE OF LIMITATIONS - SURVIVAL ACTION - IF THE DECEDENT'S KNOWLEDGE OF THE INJURIES AND CAUSAL FACTORS OF THAT INJURY IS SUFFICIENT TO SATISFY BOTH PRONGS OF THE DISCOVERY RULE THEN THE DECEDENT IS CONSIDERED TO HAVE INQUIRY NOTICE AND THE SURVIVAL CAUSE OF ACTION FOR BOTH THE DECEDENT AND PERSONAL REPRESENTATIVE WILL BEGIN TO ACCRUE DURING THE DECEDENT'S LIFETIME.

TORT- WRONGFUL DEATH - THE WRONGFUL DEATH ACTION WILL NOT BEGIN TO ACCURE UNTIL THE BENEFICIARIES HAVE INQUIRY NOTICE. ANY KNOWLEDGE OF THE DECEDENT WILL NOT BE IMPUTED TO THE BENEFICIARIES TO OBTAIN SUFFICIENT NOTICE INQUIRY.

Facts: Elsie L. Benjamin, appellant, as surviving spouse and on behalf of the surviving children of Robert L. Benjamin, Sr., decedent, filed a survival action and wrongful death action in the Circuit Court for Baltimore City against various defendants/appellees. Appellants alleged that the decedent died on May 25, 1997 as a result of mesothelioma caused by exposure to asbestos containing products sold by the defendants. The appellees moved for summary judgment on the ground that the actions were barred by the statute of limitations. Appellant contended there was no evidence that the decedent had actual knowledge that his cancer was caused by exposure to asbestos. Furthermore, there was no evidence that appellant or the decedent's children knew the disease was caused by asbestos exposure. Appellees contended that the mere diagnosis of mesothelioma was sufficient to put appellant and the decedent on inquiry notice no later than the spring of 1997.

The evidence indicated that the decedent had told doctors in 1997 that he had been exposed to asbestos. Appellant testified that she had no knowledge of the exposure and was not aware that Mr. Benjamin told the doctors that he had been exposed. Appellant also testified that she did know that the decedent was diagnosed with and died from mesothelioma.

The circuit court granted summary judgment in favor of appellees stating that the actual knowledge of the diagnosis of mesothelioma and asbestos exposure was sufficient for the causes of action to accrue and, therefore, both the survival and wrongful death actions were barred by limitations.

The issue presented in this case was when the causes of actions against manufacturers of asbestos containing products accrued. Usually the question is one for the court. Tort actions abide by the general rule that the cause of action accrues at the time of the wrong. However, an exception is the discovery rule, which states that the cause of action does not accrue until the injury is discoverable.

The application of the discovery rule has two sub-questions: 1) the sufficiency of knowledge needed to put the claimant on inquiry notice, and 2) if the claimant did investigate, the extent of information that was knowable. In this case, the second prong of the discovery rule was satisfied because the appellant acknowledged, at least tacitly, that if an inquiry had been made it would have yielded a causal relationship between the

diagnosis of mesothelioma and the exposure to asbestos. Therefore, the primary focus revolves around the first prong of the discovery rule, the nature and extent of actual knowledge necessary to cause an inquiry to be made.

In assessing the knowledge required for inquiry notice, it is essential to determine whose knowledge is determinative. In a survival action, both the decedent and the personal representative are the determinative persons. In a survival action brought by the personal representative, the decedent will be the determinative person when the decedent's knowledge is sufficient for inquiry notice and the inquiry would have yielded pertinent information. If the decedent does not have knowledge sufficient to satisfy the discovery rule, the personal representative is the determinative party and must be on inquiry notice for the cause of action to accrue.

In a wrongful death action, if the decedent does not have knowledge sufficient to satisfy the discovery rule, the beneficiaries are the determinative parties. In this instance, the action will not begin to accrue until the beneficiaries have inquiry notice. The decedent's knowledge will not be imputed or otherwise charged to the beneficiary claimants.

Held: Reversed in part, affirmed in part. The Court of Special Appeals held, with regard to the survival action, that the decedent's actual knowledge of his diagnosis of mesothelioma and his actual knowledge of his exposure to asbestos was sufficient, as a matter of law, to have placed the decedent on inquiry notice. Therefore, the survival action was barred for failure to file within the period of limitations.

With regard to the wrongful death action, the Court held that it could not rule as a matter of law, based on inferences drawn from the evidence. Even though appellant and other beneficiaries had express knowledge of the diagnosis of mesothelioma, this knowledge alone was insufficient to constitute inquiry notice. On a motion for summary judgment, all inferences must be drawn in the light most favorable to the non-moving party. As a result, the Court could not infer, as a matter of law, that appellant knew the decedent had been exposed to asbestos or that appellant had further knowledge about mesothelioma other than it was a type of cancer.

Therefore, summary judgment with respect to the survival action was affirmed, summary judgment with respect to the wrongful death action was vacated, and the case was remanded for further proceedings.

Benjamin v. Union Carbide Corporation, No. 959, September Term, 2004, filed May 3, 2005. Opinion by Eyler, James R., J.

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ZONING - "ZONING ACTION" - PROPERTY - ZONING & PETITION FOR JUDICIAL REVIEW - PROVISIONS IN THE Md. CODE (1957 2003 Repl. Vol.), Art. 66B, § 2.09 ALLOWS AN ADMINISTRATIVE APPEAL OF LEGISLATIVE ACTS OF THE CITY COUNCIL ONLY IF THEY CONSTITUTE "ZONING ACTION." THE GRANTING OF A CONDITIONAL USE IS NOT A CHANGE IN ZONING CLASSIFICATION AND THUS DOES NOT CONSTITUTE ZONING ACTION.

Facts: Appellants, MBC Realty, LLC and other landowners in Baltimore City, filed a petition for judicial review of certain ordinances enacted by the Mayor and the City Council of Baltimore, appellees, in the Circuit Court for Baltimore City. The ordinances in question allow general advertising signs to be placed on the 1st Marina Arena as a conditional use under pertinent City zoning laws. Appellants contend that the ordinances are not valid because it constitutes illegal spot, piecemeal, contract, and conditional zoning, and furthermore, they violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

On March 27, 2000, the City enacted an ordinance that repealed and reenacted several sections of the zoning code and also added new sections. This ordinance stated, in part that: 1) general advertising signs affect the use of public streets and sidewalks; 2) general advertising signs are considered public nuisances; 3) they constitute a hazard to public health, safety, and welfare because of the distracting nature of general advertising signs; and 4) they may also harm the welfare of the City by generating clutter and endorsing an unfavorable aesthetic impact. As a result of the enactment of this ordinance, the use of general advertising signs was prohibited.

On April 9, 2003, the City enacted the three ordinances at issue. All three ordinances, 03-513, 03-514, and 03-515, allowed erection and placement of general advertising signs on publicly-

owned stadiums and arenas, if they were approved as a conditional use. Ordinance 03-515 specifically permitted the erection of billboards on the 1st Marina Arena, subject to express conditions, including the removal of certain signs in other locations in the City.

On April 14, 2003, appellants filed a petition for judicial review of the enactment of ordinances 03-513, 03-514, and 03-515, pursuant to the provisions in the Md. Code (1957 2003 Repl. Vol.), Art. 66B, § 2.09 (hereinafter "§ 2.09") and title 7, chapter 200 of the Maryland Rules. Appellants also filed a motion to stay the effect of the ordinances and to receive additional evidence. The court denied the motion. On July 1, 2003, the Mayor and City Council of Baltimore filed a joint motion to dismiss the petition on the ground that enactment of the ordinances was not "zoning action" within the meaning of Section 2.09(a)(1) (ii). On August 15, 2003, the motion to dismiss was granted on the ground that Section 2.09 did not allow for an administrative appeal under the circumstances of this case.

At or about the same time appellants filed the petition for judicial review, they also filed a separate suit in circuit court, invoking the court's general jurisdiction. The case was removed to the United States District Court for the District of Maryland by the Mayor and City Council of Baltimore, based on the contention of appellants that the ordinances violated the equal protection clause of the Fourteenth Amendment. Appellees filed a motion to stay, and appellants filed a motion to remand. Both motions were denied, and there have been no further proceedings.

Held: Affirmed. The plain language of section 2.09 allows an administrative appeal from legislative acts of the City Council only if they constitute "zoning action." When a legislative body comprehensively zones, comprehensively rezones, or adopts a text amendment to a zoning ordinance, it is not zoning action. However, when a legislative body changes the zoning classification of a particular place, that is considered zoning action and, therefore, is subject to an administrative appeal. The granting of a conditional use is not a change in zoning classification and does not constitute zoning action.

Ordinances 03-513 and 03-514 are text amendments and are not subject to administrative appeal. Ordinance 03-515 is not a text amendment, but it does not reclassify property with respect to either zone or use.

Piecemeal zoning or spot zoning occurs when a small part of a zoning district is placed in a different classification than the surrounding property. Appellant contends that the ordinances

are equivalent to piecemeal zoning because a change in zoning occurred and the change did not affect all of the land in that zone. This argument is unavailing because the ordinances at issue did not change the zoning classifications of the Arena.

The merits of appellants' arguments that reclassification of use is the equivalent of reclassification of zone and, therefore, illegal are not before this Court. The question of whether the enactments are illegal is also not before this Court. There is nothing in the opinion that will preclude appellants from pursuing the questions of illegality in a different suit.

MBC Realty, LLC v. Mayor & City Council of Baltimore, No. 1312, September Term, 2003, filed December 27, 2004. Opinion by Eyler, James, R., J.

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ATTORNEY DISCIPLINE

By an Order of the Court of Appeals of Maryland dated August 8, 2005, the following attorney has been disbarred by consent from the further practice of law in this State:

THOMAS PAUL LINIAK

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By an Order of the Court of Appeals of Maryland dated August 16, 2005, the following attorney has been disbarred by consent from the further practice of law in this State:

FREDRIC M. BRANDES

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JUDICIAL APPOINTMENTS

On July 25, 2005, the Governor announced the appointment of the **HON. LOUIS ALOYSIUS BECKER** to the Circuit Court for Howard County. Judge Becker was sworn in on August 11, 2005 and fills the vacancy created by the retirement of the Hon. James P. Dudley

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On July 20, 2005, the Governor announced the appointment of **CRYSTAL DIXON MITTELSTAEDT** to the District Court for Prince George's County. Judge Mittelstaedt was sworn in on August 11, 2005 and fills the vacancy created by the retirement of the Hon. Josef B. Brown.

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On July 6, 2005, the Governor announced the appointment of **O. JOHN CEJKA, JR.** to the District Court for Frederick County. Judge Cejka fills the vacancy created by the retirement of the Hon. Frederick J. Bower.

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On July 25, 2005, the Governor announced the appointment of **RICHARD SCOTT BERNHARDT** to the Circuit Court for Howard County. Judge Bernhardt was sworn in on August 24, 2005 and fills the vacancy created by the retirement of the Hon. Raymond J. Kane, Jr.

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