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McDonald, J., concurs.

http://mdcourts.gov/opinions/coa/2012/22a12.pdf

STATUTORY INTERPRETATION – LOCAL OPEN MEETINGS REQUIREMENTS – BOARD OF APPEALS OF CHARLES COUNTY

Facts:

Respondent WSG Holdings, Inc. (WSG) filed an application for a special exception to the Charles County Zoning Regulations. The Charles County Board of Appeals, during a hearing regarding WSG's application, decided to visit the property at issue. The Board limited attendance at this visit to the Board members, WSG's representative, WSG's attorney, a member of the community opposed to the application, and an opponent's attorney. No record was kept about the visit. In a Motion for Appropriate Relief filed after the visit and before the Board's vote on the special exception application, a member of the community alleged that the Board took testimony and evidence during the visit, in violation of the open meeting requirements provided in the Board's Rules of Procedure and the Charles County Code. The Board denied the Motion and thereafter granted the special exception sought by WSG.

A group of community members, including Respondents, filed a Petition for Judicial Review in the Circuit Court for Charles County, arguing in part that the visit violated the open meetings requirements. Although the Circuit Court remanded the matter to the Board for further consideration of the substantive issues before it, the court ruled against the community members on the issue of the alleged open meetings violations, reasoning that the community members had failed to preserve that contention by not raising it before their Petition for Judicial review. The Court of Special Appeals reversed. The Court of Appeals granted WSG's Petition for Writ of Certiorari.

Held: Affirmed.

The Court of Appeals affirmed the Court of Special Appeals, agreeing that the issue of a violation of the open meetings provisions of Article 66B of the Maryland Code, Section 4.07 of the Charles County Code, and the Board's own Rules of Procedure, was preserved for judicial review. The Court then considered whether the site visit constituted a meeting and hearing, so as

to bring it within the purview of the open meetings provisions in question. The Court determined that it did, reasoning that the Board asked questions and received answers from the stakeholders while at the site visit and was, therefore, engaged in a meeting that was not open, in violation of Section 4.07 of Article 66B of the Maryland Code, and a hearing that was not open, in violation of Charles County Code and the Rules of Procedure. The Court then held that the site visit violated the open meetings provisions of Article 66B of the Maryland Code, Section 4.07 of the Charles County Code, and the Board's own Rules of Procedure and that the Board's actions were, therefore, void *ab initio*.

CR-RSC Tower I, LLC, et al. v. RSC Tower I, LLC, et al., No. 115, September Term 2011, filed November 27, 2012. Opinion by Adkins, J.

Harrell and Battaglia, JJ., dissent.

http://mdcourts.gov/opinions/coa/2012/115a11.pdf

EVIDENCE – BREACH OF CONTRACT DAMAGES – LOST PROFITS – POST-BREACH MARKET EVIDENCE

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Facts:

Developers entered into ground leases with the owners of land to develop adjoining properties into high rise apartment complexes. To finalize the necessary financing agreement, the developers requested that the owners execute estoppel certificates, as called for by the ground leases. The owners refused, causing the developers to file suit. The Circuit Court found the owners in breach of the ground leases and ordered them to immediately execute the required estoppel certificates. The owners appealed and expressly reserved "all claims asserted in the pending litigation" in the estoppel certificates provided to the developers. These estoppel certificates were rejected. The Court of Special Appeals would ultimately affirm the Circuit Court, but by that time, the previous financing arrangement was no longer available, and the building permits had expired.

The developers subsequently filed a second lawsuit alleging that the owners acted in bad faith and seeking damages of $50 million. During discovery, the owners refused to provide a reason for their decision not to sign the estoppel certificates, instead, stating that the decision was based on advice from counsel. At trial, the Circuit Court prohibited any evidence of "post-breach market conditions." This had the effect of preventing the owners from presenting evidence or pursuing cross-examination regarding the post-breach decline in the real estate market. The jury found in favor of the developers and awarded damages of $36,350,239 against the owners, jointly and severally. The Court of Special Appeals issued a published opinion reversing the joint and several nature of the damages award but otherwise affirming.

Held: Affirmed

When determining consequential lost profits, the core question is whether the damages were in the contemplation of the parties when they contracted. Thus, circumstances that cannot be said to have been known to the parties when they contracted should not affect the measure of consequential damages. When both parties' success depends on a relatively stable market, it cannot be said that a subsequent, unforeseen market crash was within the parties' contemplation. In such a circumstance, evidence of post-breach market booms or busts is not admissible to prove lost profits.

The Court then held that, when defending against a charge of bad faith, a defendant is not permitted to reference specific communications with attorneys that purportedly provided a good-faith basis for certain actions without allow any further investigation into those communications. Such tactics would allow the defendant to abuse the attorney-client privilege by using it both as a sword and a shield. Defendants that engage in such conduct waive the attorney-client privilege.

While the Court agreed that the owners could not be held jointly and severally liable on the damages award, the Court held that they could still be jointly and severally liable for attorneys' fees when the owners conspired to breach the contract, had a joint legal defense, and shared experts.

Reginald McCracken v. State of Maryland, No. 18, September Term, 2012, filed November 28, 2012. Opinion by Barbera, J.

http://mdcourts.gov/opinions/coa/2012/18a12.pdf

CRIMINAL LAW – SEIZURE – TERRY FRISK – PLAIN FEEL DOCTRINE – REQUIREMENT THAT THE INCRIMINATING CHARACTER OF ITEMS FELT BE "IMMEDIATELY APPARENT"

Facts:

Petitioner, Reginald McCracken, was charged with transporting a handgun in a motor vehicle. Before trial, he moved for suppression of the handgun, claiming that it had been seized as the fruit of an earlier unlawful seizure of keys and a car remote from his pants pocket during a lawful *Terry* frisk.

At the suppression hearing, Officer Adrian McGinnis testified that he responded to a report of an armed individual, and when he arrived on the scene he observed Petitioner and a woman arguing. The woman told Officer McGinnis that Petitioner had just "hacked" her to their present location, and that during the car ride he threatened to shoot her. Officer McGinnis knew “hacking” to be a slang term describing the illegal provision of taxi services without a license. When Officer McGinnis spoke with Petitioner, he learned that Petitioner did not live nearby, and Petitioner gave conflicting stories regarding his mode of transportation that night. Petitioner acknowledged that he and the woman had been arguing, but he denied he had been hacking. Officer McGinnis then conducted a *Terry* frisk of Petitioner, during which he seized a set of keys and a car remote from Petitioner’s pants pocket. Officer McGinnis pressed the alarm button on the remote, which sounded an alarm on a car parked nearby. Looking through the open window of the car, Officer McGinnis saw a black handgun in the open glove compartment, which he seized. On cross-examination, Officer McGinnis admitted that at the time he felt the keys in Petitioner’s pocket, he did not know for certain what vehicle, if any, the keys would open.

After Officer McGinnis’s testimony, Petitioner argued that the seizure of the keys and car remote violated the plain feel doctrine of *Minnesota v. Dickerson*, 508 U.S. 366 (1993). The suppression court denied Petitioner’s motion, and he was found guilty of transporting a handgun in a motor vehicle. Petitioner noted an appeal to the Court of Special Appeals. In an unreported opinion, that Court affirmed the denial of Petitioner’s motion to suppress the items seized by Officer McGinnis.

Held: Affirmed.

Petitioner argued that the plain feel doctrine does not justify the seizure of keys and a car remote from his pocket during the lawful *Terry* frisk because the officer lacked probable cause to

believe the items were evidence of hacking. In support, Petitioner emphasized that Officer McGinnis did not know with certainty that the keys and car remote belonged to a vehicle, or that the vehicle was in the vicinity. Therefore, claimed Petitioner, the incriminating nature of the items was not immediately apparent to the officer, as is required by *Minnesota v. Dickerson*.

The Court of Appeals held that Petitioner was not entitled to relief. The Court noted that, at the time he conducted the *Terry* frisk, Officer McGinnis was aware that Petitioner did not live nearby, that Petitioner claimed he did not drive to their location, and that Petitioner gave two conflicting explanations for his presence there. Moreover, a woman at the scene reported to Officer McGinnis that Petitioner threatened to shoot her while hacking her to that neighborhood. The Court explained that, under Supreme Court jurisprudence, the probable cause standard does not require an officer to be certain that items seen or felt are evidence of criminal activity. It merely requires that, from the standpoint of a reasonable officer, the facts give rise to a fair probability that the keys and car remote were evidence of hacking. The Court held that the facts in this case were sufficient to establish probable cause that the keys and car remote were immediately apparent to be evidence of the crime of hacking.

Ramiro Arce Gonzalez v. State of Maryland, No. 4, September Term 2012, filed December 20, 2012. Opinion by Barbera, J.

Bell, C.J., Harrell and Greene, JJ., dissent.

http://mdcourts.gov/opinions/coa/2012/4a12.pdf

CRIMINAL LAW – MIRANDA WARNINGS – ADEQUACY OF ADVISEMENT

CRIMINAL LAW – MIRANDA WARNINGS – VALID WAIVER OF FIFTH AMENDMENT RIGHTS

Facts:

Petitioner, Ramiro Arce Gonzalez, was arrested on suspicion of murder in October 2005 and made an inculpatory statement while being interrogated by the police. Before trial, Petitioner moved to suppress the statement, on the grounds that it was obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966). Petitioner, whose native language is Mixtec Alto, asserted that he did not understand the Miranda warnings, which were administered primarily in Spanish.

At the suppression hearing, the state trooper who advised Petitioner of his Miranda rights explained in great detail the process he employed. When Petitioner indicated that he did not understand, the trooper rephrased until Petitioner understood. In particular, Petitioner did not understand the Spanish words for "court" and "attorney." To explain these concepts to Petitioner, the trooper used what he believed to be the Mixtec words for those terms, which he had obtained from the sister of Petitioner's acquaintance, who had also been arrested on suspicion of the same murder. The trooper did not recall precisely what Mixtec words he used, but he testified that Petitioner seemed to understand those words and eventually indicated that he understood his rights, signed the waiver form, and agreed to answer questions. The Miranda advisement process was not recorded, and no notes or transcript of it were offered into evidence at the suppression hearing. The ensuing interrogation was conducted entirely in Spanish, with the trooper interpreting the investigating detective's questions into Spanish for Petitioner, and Petitioner's responses into English for the detective. Upon hearing an audiotape of the interrogation, the suppression court observed that the defendant immediately answered questions posed in Spanish, suggesting that he comprehended the questions asked by the detective and interpreted by the trooper. The court denied the motion to suppress, and the statement was admitted at trial. Petitioner was convicted of first degree murder and related charges.

On appeal, Petitioner argued that the statement should have been suppressed for two related reasons: (1) Without knowing what Mixtec words the trooper used to advise Petitioner of his rights, the State could not carry its burden to prove that the Miranda warnings were constitutionally adequate; and (2) Petitioner could not have knowingly, intelligently, and voluntarily waived his Miranda rights because he did not understand Spanish well enough to

comprehend the warnings, he was a recent immigrant, barely eighteen years old, uneducated, and unacquainted with the criminal justice system in the United States. In an unreported opinion, the Court of Special Appeals held that the circuit court did not err in denying Petitioner's motion to suppress.

Held: Affirmed.

The Court of Appeals observed that while Miranda v. Arizona requires that a criminal suspect be advised of his Fifth Amendment rights prior to any custodial interrogation, there is no exact wording that must be used to explain these rights. The Court concluded that the record before the suppression court, particularly the detailed testimony of the advising officer which the suppression court found to be credible, was sufficient to permit the court to rule that the Miranda warnings were adequate and reasonably conveyed to Petitioner his rights.

In evaluating the validity of Petitioner's waiver of his Fifth Amendment rights, the Court considered the totality of the circumstances, including Petitioner's personal characteristics and the fact that the judge had ordered that Petitioner have a Mixtec Alto interpreter to assist him at trial, and held that the suppression court did not err in finding that Petitioner knowingly, intelligently, and voluntarily waived his Miranda rights.

COURT OF SPECIAL APPEALS

Dakrish, LLC T/A Vineyards Elite v. Ran Raich et al., No. 1327, September Term, 2011, filed November 30, 2012. Opinion by Graeff, J.

http://mdcourts.gov/opinions/cosa/2012/1327s11.pdf

Art. 2B § 16-101; APPEALS TO APPELLATE COURTS

Facts:

Appellee, Ran Raich, applied to the Board of Liquor License Commissioners for Baltimore County ("Board") for a beer, wine, and liquor license. Appellant, Dakrish LLC, appeared in opposition to the request. The Board denied the application. Appellee filed a petition for judicial review in the Circuit Court for Baltimore County. The circuit court reversed and remanded the case to the Board with instructions to issue a liquor license to Mr. Raich.

On appeal, appellant contended that the circuit court erred in reversing the Board's decision because a substantial basis existed for the Board's decision. Appellee argued that appellant lacked standing to pursue judicial review because it was not an aggrieved party. Alternatively he argued that the circuit court properly reversed the Board's decision denying his request for a liquor license.

Held: Reversed.

Reversed and remanded to circuit court with instructions to affirm the Board's decision. Although Art. 2B, § 16-101(e) requires that a party seeking judicial review in circuit court be aggrieved to have standing, that section is not applicable to an appeal to this Court. Section 16-101(f) is the pertinent statutory provision addressing appeals to this Court. This statute, by its plain language, permits an appeal from circuit court to this Court by "any party of record to an appeal of a decision of a local licensing board to the circuit court." There is no requirement that the person appealing be "aggrieved." Appellee does not dispute that appellant was a party of record to the circuit court appeal, and therefore, pursuant to § 16-101(f), appellant has standing to appeal to this Court. There was substantial evidence in the record to support the Board's decision.

Hubert Allen Wood v. State of Maryland, No. 1635, September Term 2011, filed December 21, 2012. Opinion by Watts, J.

http://mdcourts.gov/opinions/cosa/2012/1635s11.pdf

MARYLAND RULE 4-215(E) – DISCHARGE OF COUNSEL – COMPETENCY TO STAND TRIAL – JURY INSTRUCTIONS – LEGALLY ADEQUATE PROVOCATION – VOLUNTARY INTOXICATION – SUFFICIENCY OF THE EVIDENCE – MOTION FOR JUDGMENT OF ACQUITTAL – FIRST-DEGREE MURDER – PREMEDITATION AND DELIBERATION – HEARSAY – RESIDUAL HEARSAY EXCEPTION

Facts:

A jury in the Circuit Court for Cecil County convicted Hubert Allen Wood, appellant, of first-degree murder. The circuit court sentenced appellant to life imprisonment, with all but eighty years suspended.

Prior to trial, appellant wrote a letter to the circuit court advising that he had not received a copy of discovery; he had been "having problems" with his assigned public defender; and he believed the defense attorney had not issued him a copy of the discovery. At a pretrial hearing, appellant complained about the lack of discovery and agreed, upon questioning by the circuit court, that he did not feel as though his defense attorney was "effectively representing" him. The circuit court advised appellant to speak with the defense attorney to address his concerns about the lack of discovery. The circuit court informed appellant that it would be willing to address the matter further should appellant wish to do so.

At another pretrial hearing, appellant's counsel advised the circuit court that appellant's mother had informed him that appellant had "a history of some admissions in the hospitals[,]" which raised an issue he wanted to pursue. A week later, appellant's counsel filed a "Suggestion of Incompetency," requesting a competency evaluation, which the circuit court granted. The circuit court issued an Order for In Custody Competency Evaluation. Subsequently, a forensic psychiatrist submitted a letter to the circuit court informing the court that appellant refused to participate in an examination, "stating that he (appellant) did not think that the examination was necessary and [] express[ing] concern that to take part would potentially incriminate him." At the next pretrial hearing, appellant's counsel informed the circuit court of appellant's refusal to participate in the competency evaluation. At a later pretrial hearing, appellant's counsel advised the circuit court that the request for a competency evaluation was being withdrawn with appellant's "concurrence." The circuit court questioned appellant as to whether he understood the consequence of withdrawing the request–that there would be no competency evaluation–and appellant replied affirmatively. Several weeks thereafter, the case proceeded to trial.

At trial, appellant's counsel sought to introduce through testimony from State's witnesses out-of-court statements by the victim that he had allegedly been assaulted by someone other than appellant prior to his death. Appellant's counsel explained that the victim was "beat up" a couple of days before he was last seen, and that the victim had told the State's witnesses the names of the individuals involved in the assault. Appellant's counsel argued that the statements were admissible under the residual hearsay exception contained in Maryland Rule 5-803(b)(24). The State opposed admission of the victim's statements as inadmissible hearsay. The circuit court agreed with the State, finding that the statements were hearsay that did not fall within any applicable exception.

At the close of the State's case, appellant moved for judgment of acquittal arguing that the evidence was confusing, contradictory, and not credible, and that it was not clear what date the victim was killed, *i.e.* it was not clear that the victim was killed on the date alleged by the State. The circuit court denied the motion. At the close of all the evidence, appellant moved again for judgment of acquittal asking the circuit court "to assess credibility with respect to the further witnesses" and arguing that the evidence demonstrated that the victim was killed on February 16, 2010, not February 12, 2010 as contended by the State. Appellant's counsel argued that intent was "still something completely open, especially given [the victim]'s state of mind." The circuit court denied the motion.

At the conclusion of all of the evidence in the case, appellant's counsel requested that the circuit court instruct the jury as to legally adequate provocation and voluntary intoxication. The circuit court refused to give the requested instructions. As to legally adequate provocation, the circuit court ruled that it did not find "any evidence to demonstrate any legally adequate provocation[,]" and, as to voluntary intoxication, the circuit court ruled that there was no evidence showing "what if anything, any drugs and/or alcohol, [appellant] had consumed at the time this murder occurred."

On appeal, appellant raised five issues: (1) Appellant contended that the circuit court failed to comply with Maryland Rule 4-215(e) by not: (a) inquiring as to whether he wanted to discharge his counsel; (b) eliciting and considering an explanation for his dissatisfaction with counsel; and (c) determining whether the reasons were meritorious, thereby warranting discharge. (2) Appellant argued that the circuit court erred in failing to determine, based upon evidence presented on the record, whether he was competent to stand trial. (3) Appellant asserted that the circuit court abused its discretion in failing to give jury instructions on legally adequate provocation and voluntary intoxication. (4) Appellant maintained that the evidence was insufficient to support his conviction for first-degree murder as there was no evidence from which a rational trier of fact could conclude beyond a reasonable doubt that he "killed [the victim] deliberately and premeditatively[.]" (5) Appellant contended that the circuit court erred in excluding evidence that the victim made statements to State's witnesses identifying other people as those responsible for assaulting him shortly before he was killed.

Held:

The Court of Special Appeals affirmed the conviction and remanded the case to the circuit court for the limited purpose of reimposition of the sentence followed by a period of probation in accordance with Criminal Procedure Article § 6-222. When a criminal defendant requests permission to discharge counsel, the trial court must follow the procedures set forth in Maryland Rule 4-215(e), which includes providing the defendant with an opportunity to explain the reasons for the request and determining whether the defendant's request is meritorious. A request to discharge counsel need not be made in writing or formally worded, but rather must express to the trial court that the defendant is dissatisfied with his or her counsel and that he or she has a present intent to seek a different legal advisor. The key is that the defendant's statements must "reasonably apprise" the trial court of the defendant's wish to discharge his or her current counsel.

A defendant's written and oral complaints concerning a lack of discovery did not constitute requests to discharge counsel triggering a Maryland Rule 4-215(e) inquiry where the defendant did not: (1) indicate that he wished to discharge his counsel; (2) independently raise any issue as to lack of effective representation; and (3) accepted his counsel's representation without complaint at additional pretrial hearings, trial, and sentencing.

Due process substantively prohibits the criminal prosecution of a defendant who is incompetent to stand trial. A criminal defendant, however, is presumed to be competent to stand trial. Maryland Code, Criminal Procedure Article Section 3-104(a) mandates the procedures to be undertaken by a trial court if the defendant's competency is called into question, providing: "If, before or during a trial, the defendant in a criminal case . . . appears to the court to be incompetent to stand trial or the defendant alleges incompetence to stand trial, the court shall determine, on evidence presented on the record, whether the defendant is incompetent to stand trial." A trial court's duty to determine a defendant's competency is triggered by motion of the defendant or defense counsel or *sua sponte* by the trial court based on its observations that the defendant may not be competent to stand trial. Withdrawal of a request for a competency evaluation is not prohibited by statute or Maryland case law. Depending on the circumstances of a case, the trial court may properly permit a defendant to withdraw a request for a competency evaluation.

A verbal argument or an exchange of words alone is not sufficient to constitute adequate provocation. That a defendant and a victim argued does not alone constitute sufficient evidence of provocation to warrant giving an instruction on legally adequate provocation. An instruction as to legally adequate provocation is not generated by the facts of the case where there is a complete lack of evidence as to either words or conduct sufficient to demonstrate any provocation and where defense counsel admits there is a lack of evidence of a mutual affray.

Whether a victim was drunk at the time of his or her death or had a history of becoming verbally and physically aggressive when drunk or intoxicated is not sufficient to demonstrate–absent some other evidence–that, on a particular occasion, the victim was the physical aggressor or that the victim physically or verbally threatened the defendant, thereby provoking the defendant to respond in hot blood.

Mere intoxication is not a defense to a crime. Rather, the defendant must have been intoxicated to such a degree at the time of the offense that he or she was unable to form the intent necessary to commit the crime.

A trial court properly refuses to give a jury instruction on voluntary intoxication where the evidence adduced at trial fails to demonstrate that the defendant was intoxicated to such a degree that he or she was unable to form the specific intent necessary to commit the crime charged.

Evidence demonstrating merely that, on the day of the offense, the defendant drank some alcohol, and appeared drunk and passed out at a time after the occurrence of the offense, is not sufficient to generate an instruction as to voluntary intoxication where no evidence showed that the defendant was intoxicated or exhibiting the effects of alcohol at the time he committed the crime.

First-degree murder is a deliberate, premeditated, and willful killing. Deliberation requires that the defendant have conscious knowledge of the intent to kill. Premeditation requires that there be enough time–an appreciable length of time–for the defendant to have deliberated and thought about the intent to kill. Willfulness requires that the defendant possess the specific purpose and intent to kill. An intent to kill may be inferred from the use of a deadly weapon directed a vital body part. Premeditation may be established circumstantially by the facts of the case. Premeditation and deliberation may be instantaneous.

The residual hearsay exception contained in Maryland Rule 5-803(b)(24) "will be used very rarely, and only in exceptional circumstances." Five conditions must be satisfied for evidence to be admissible under Maryland Rule 5-803(b)(24): (1) there must be "exceptional circumstances"; (2) the statement must not be specifically covered by any of the other exceptions; (3) the statement must have "equivalent circumstantial guarantees of trustworthiness"; (4) the court must determine that (a) the statement is offered as evidence of a material fact, (b) the statement is more probative on the point for which it is offered than any other evidence which the proponent can produce through reasonable efforts, and (c) the general purposes of the rules and the interests of justice will best be served by admission of the statement into evidence; and (5) the proponent of the statement has given the requisite advance notice of its intention to use the statement.

A trial court is not procedurally required to make findings as to each factor of Maryland Rule 5-803(b)(24) in excluding admission of a hearsay statement, although the court may do so. The Rule and case law mandate, however, that a trial court procedurally address each factor in admitting a hearsay statement.

Where a proponent of a hearsay statement neither offered nor described any exceptional circumstance warranting admission of the statement, the trial court properly excluded the statement.

Death of a declarant is not a new and unanticipated situation constituting an exceptional circumstance warranting admission pursuant to the residual hearsay exception because the Maryland Rules clearly contemplate situations in which a declarant is deceased and yet his or her statement is admissible pursuant to a hearsay exception.

Phillip Thane Olson v. State of Maryland, No. 3032, September Term 2009, filed November 28, 2012. Opinion by Kenney, J.

http://mdcourts.gov/opinions/cosa/2012/3032s09.pdf

CRIMINAL LAW – RESISTING ARREST – ATTEMPTED ARREST

CRIMINAL LAW – SEARCH & SEIZURE – EXCEPTIONS TO WARRANT REQUIREMENT – EXIGENT CIRCUMSTANCES BASED ON OBSERVATION OF AN ONGOING CRIME.

CRIMINAL LAW – SEARCH & SEIZURE – EXCEPTIONS TO WARRANT REQUIREMENT – COMMUNITY CARETAKING DOCTRINE.

CRIMINAL PROCEDURE – JURY INSTRUCTIONS – PLAIN ERROR – INVITED ERROR

CRIMINAL LAW – KEEPING A DISORDERLY HOUSE

Facts:

Appellant's apartment is directly above the apartment of Michelle and Larry Straitiff. Their apartment building is in a heavily populated residential area. On the evening of February 14, 2009, the Straitiffs called the police to report excessive music and noise emanating from appellant's apartment. Police officers responded to the call, issued appellant a warning, and then left. The officers returned twice that evening pursuant to further complaints by the Straitiffs. The officers issued appellant a citation for keeping a disorderly house, and they later filed for a criminal summons for the same.

On May 12, 2009, at approximately 1:00 a.m., Mrs. Straitiff again reported excessive music and noise – including "screamed" expletives – emanating from appellant's apartment. When police officers responded to the call, appellant refused to open his door but continued to make loud noise, including shouting expletives at police officers. For over an hour officers – speaking through the door – unsuccessfully attempted to induce appellant to reduce the noise. Eventually, the officers informed appellant that "that we were coming in. If he didn't open the door, we were coming in after him," and that "he was going to be placed under arrest." Meanwhile, another officer, who had gone to appellant's rear window via the fire escape, reported that appellant had an assortment of knives nearby which he had been cleaning. When the order to enter appellant's apartment was given, the Fire Department "popped the door" using a hydraulic hand tool. As the officers entered the apartment, appellant "charged" at them with his hands in the air. One of the officers fired his taser and appellant fell backwards.

Appellant was charged with, *inter alia*, resisting arrest and keeping a disorderly house. At trial, the court issued appellant's requested instruction for resisting arrest, which omitted the element that appellant resist the arrest *by force*.

Held:

The court held that, while there was no physical contact between appellant and police, appellant's actions constituted resisting an *attempted* arrest. And, although the police invasion of appellant's apartment was made without a warrant, it was nonetheless "reasonable" under the Fourth Amendment. While the officers' observation of an ongoing crime – his disturbance of the peace – might be considered "exigent circumstances" justifying the warrantless entry, the entry in order to abate the noise was justifiable under the "community caretaking" exception to the warrant requirement. Although appellant's Fourth Amendment rights would ordinarily be at their zenith when he is home at night, he undermined his right to privacy by projecting loud noises into the neighborhood in the wee hours of the morning, thereby significantly disrupting his neighbors' peace. It would have been appropriate, and perhaps feasible, for the police to have obtained a warrant soon after they first arrived on the scene, but appellant should not be rewarded – and the neighborhood penalized – for the extended period of police patience and restraint.

The court also held that, although the court's jury instruction for resisting arrest was erroneous, a party may not request an instruction and later complain on appeal that the requested instruction was given. Finally, because a conviction for keeping a disorderly house cannot be based on the conduct of one person, the court vacated both of appellant's convictions for that offense.

State of Maryland v. Andre Johnson, No. 0782, September Term 2012, filed November 30, 2012. Opinion by Moylan, J.

http://mdcourts.gov/opinions/cosa/2012/0782s12.pdf

FOURTH AMENDMENT – SEARCH AND SEIZURE – WARRANTED SEARCH – STANDARD OF REVIEW OF WARRANTED SEARCH BY SUPPRESSION JUDGE – SUBSTANTIAL BASIS FOR ISSUING SEARCH WARRANT.

Facts:

On December 4, 2010, an extended episode of road rage on the Baltimore beltway culminated in shots being fired by the driver of a gold Ford Taurus. The Taurus was registered to the appellee, Andre Johnson. Baltimore County Police placed the appellee's home under surveillance and, later that day, observed the gold Taurus arrive at the house, driven by the appellee's son, Tavon Jamal Frisby. Frisby was arrested and the vehicle was searched, but no gun was found. Police had reason to believe that Frisby was a member of a gang known as the Bloods. Police learned from intercepted telephone calls Frisby made from jail that Frisby was concerned about how someone named "Tony" had reacted to his being arrested and that Frisby intended to obtain a gun from Tony upon his release. At the relevant time, Frisby was under 18 years of age and, thus, prohibited from legally purchasing a handgun.

Frisby was released from jail on December 13, 2010. On January 25, 2011, police again placed his home under surveillance. Officers observed Frisby arrive in a blue Toyota, enter the house carrying a backpack, and leave five minutes later, without the backpack. Undercover police officers attempted to follow Frisby but soon broke off the surveillance after Frisby repeatedly made counter-surveillance maneuvers.

Police applied for a warrant to search the gold Ford Taurus, the blue Toyota, and the home shared by Frisby and Johnson. Police hoped to find evidence of gang activity involving Frisby and "Tony" and a handgun – either the one Frisby had used in the December 4, 2010 road rage incident or the one Frisby intended to get from "Tony." The warrant was issued.

As a result of the search, Johnson, the appellee, was charged in the Circuit Court for Baltimore County with two counts of possession of narcotic drugs with the intent to distribute. Before trial, he moved to have suppressed physical evidence that had been seized during the warranted search of his residence. Following a suppression hearing on May 25, 2012, the circuit court ruled that the search warrant had not been supported by probable cause and that the evidence would, therefore, be suppressed. The State appealed from the suppression ruling.

Held: Suppression ruling reversed; case remanded for trial.

A judge hearing a motion to suppress evidence found in the course of a warranted search does not review the application for the issued search warrant de novo, i.e., for probable cause. Instead, a suppression judge reviews the application for the search warrant to determine whether the judge who issued the warrant had a substantial basis for doing so. Even if the suppression judge believes there was not probable cause to issue the warrant, the suppression judge still must uphold the warrant if there was a substantial basis for issuing it.

The substantial basis standard is less onerous than the probable cause standard. The courts' preference for warrants reflects a deliberate policy decision that the most effective way to protect the Fourth Amendment guarantees of all citizens is to discourage police officers from conducting warrantless searches and seizures by rewarding police officers' resort to warrants issued by neutral and detached magistrates.

The Court expresses no opinion in this case as to whether there was probable cause for the warrant to issue, because such inquiry is irrelevant for any court reviewing the issued warrant.

There was a substantial basis for the issuance of the search warrant. A suppression court's review of a search warrant is limited to the four corners of the warrant application. Ambiguous language in a warrant application must be read with an eye toward upholding the warrant rather than striking it down. Contrary to the suppression court's analysis, there was a sufficient nexus between Frisby's alleged criminal activity and the home that was searched to provide a substantial basis for issuing the warrant. Frisby had a sufficient opportunity to secrete a handgun in his home between the road rage incident and the time police placed his home under surveillance later that day; moreover, Frisby was a suspected gang member and had expressed an intent to illegally obtain a handgun upon his release from jail.

Even if there was no substantial basis for the warrant to issue, the police relied on the warrant in good faith and, for that reason alone, the evidence should not have been suppressed.

Wesley Torrance Kelly v. State of Maryland, Nos. 2479 and 2679, September Term 2010, filed November 27, 2012. Opinion by Eyler, James R.

http://mdcourts.gov/opinions/cosa/2012/2479s10.pdf

CRIMINAL LAW – WARRANTLESS USE OF GPS TRACKING DEVICES – FOURTH AMENDMENT

Facts:

Wesley Torrance Kelly, appellant, appealed from convictions in the Circuit Court for Howard County and the Circuit Court for Anne Arundel County. The cases were consolidated on appeal. In Anne Arundel County, the court convicted appellant of burglary in the second degree, committed on April 12, 2010, and sentenced him to ten-years' imprisonment. In Howard County, a jury convicted appellant of theft, committed on April 5, 2010, and the court sentenced him to ten-years' imprisonment.

In both cases, appellant contended the courts erred in denying his motions to suppress evidence allegedly obtained as a result of a Global Positioning System (GPS) device placed on his vehicle on April 2, 2010, by police officers without a warrant. On January 23, 2012, the Supreme Court decided United States v. Jones, 132 S. Ct. 945 (2012), holding that placement of a GPS device on a vehicle located on a public thoroughfare constitutes a search.

In summary, a series of commercial burglaries occurred in Howard County on February 22, 2010, February 24, 2010, March 2, 2010, March 29, 2010, April 5, 2010, and in Anne Arundel County on April 12, 2010. Howard County police officers began investigating the incidents on February 22, 2010. The first burglary was of a dental office from which, inter alia, a signed blank bank check was taken. On February 27, 2010, the check was cashed, with the name of a payee, Nicole Cromwell, and an amount having been added. After reviewing surveillance tape at the bank where the check was cashed, police officers identified Ms. Cromwell through a computer check. Police officers also learned from the tape that Ms. Cromwell had been dropped off at the bank by a green Chevrolet Trailblazer. On March 5, 2010, officers obtained an arrest warrant for Ms. Cromwell. On March 9, officers arrested Ms. Cromwell. She cooperated and identified a person named "Tony" as the person who gave her the check. She also provided a residence address for Tony, an apartment at 3706 W. Saratoga Street. Police officers conducted surveillance of that residence, noted the presence of the Trailblazer, conducted a computer check of the Trailblazer, and determined it was owned by appellant. Police officers obtained a photograph of appellant and showed it to Ms. Cromwell, who identified appellant as Tony, the person who gave her the check.

Subsequently, on April 2, 2010, police officers placed a GPS tracking device on the exterior of appellant's Trailblazer. The device was on the vehicle from April 2 through April 12. The device tracked and recorded movement of the vehicle, producing six hundred pages of data.

Police officers did not monitor the device at all times but used it to locate appellant on at least three occasions. Based on the information obtained prior to placement of the device and additional information obtained after placement of the device, police officers, on April 12, 2010, obtained search warrants for appellant's Trailblazer, two residences, and three pawn shops. A search of those locations produced incriminating evidence.

Relying heavily on Jones, supra, appellant argued that placement of the GPS device was a search because it constituted a physical trespass to chattel and violated his reasonable expectation of privacy. Acknowledging that the Supreme Court, in Jones, did not reach the question of reasonableness, appellant argued that a warrantless search is per se unreasonable, unless it fits within a recognized exception, none of which were applicable in these cases. Appellant added that the State waived any reasonableness argument because it was the State's burden to establish reasonableness, and it failed to do so in circuit court.

Appellant also argued that the good faith exception to application of the exclusionary rule, as enunciated in Davis v. United States, 131 S. Ct. 2419 (2011), did not apply because there was no "binding appellate precedent" in Maryland, at the time of placement of the tracking device, holding that such action was legal. Appellant explained that this Court's decision in Stone v. State, 178 Md. App. 428 (2008), relied on by the circuit court, is distinguishable and, in light of Jones, based on faulty reasoning. Thus, it was not binding appellate precedent within the meaning of Davis.

Held:

Pursuant toDavis, binding precedent does not require that there be a prior appellate case directly on point, i.e., factually the same as the police conduct in question. Just as Maryland had generally recognized New York v. Belton, 453 U.S. 454 (1981), as permitting a search incident to arrest of an unoccupied vehicle, Maryland had recognized and applied the rationale of United States v. Knotts, 460 U.S. 276 (1983),i.e., that the owners of vehicles did not have a reasonable expectation of privacy in their movement on a public highway. Stone at 446. In addition, as was true of many courts, this Court, in Stone, assumed that the expectation of privacy test was the prevailing legal standard. The good faith exception to the exclusionary rule applied, and the court did not err in denying the motion to suppress evidence.

Donald L. Richardson v. Jacquelyn L. Boozer, No. 0774, September Term 2011, filed December 20, 2012. Opinion by Hotten, J.

http://mdcourts.gov/opinions/cosa/2012/0774s11.pdf

FAMILY LAW – CHILD SUPPORT – PARENTAL DUTIES & RIGHTS – OBLIGATIONS – TERMINATION – SECONDARY SCHOOL EDUCATION

Facts:

On August 15, 2009, the court ordered that appellant-father pay child support to appellee-mother until the later of (1) the child attaining the age of eighteen years or (2) the child's graduation from high school.

On November 29, 2009, the child began residing with appellant. Appellant ceased his child support payments, and filed a motion on December 9, 2009, requesting that the court (1) order appellee to pay child support until the child attained the age of eighteen or graduated from high school; (2) order appellee to pay a specific amount by check for overpayment of child support; and (3) order appellee to file a statement of satisfaction of monetary judgment.

On April 11, 2010, the child returned to his mother's home, and was expected to graduate from high school on June 12, 2010. However, he failed to meet the graduation requirements and earn his diploma. As a result, on August 16, 2010, appellant renewed the abovementioned motion regarding child support. Appellee alleged that the high school's administration permitted the child to register for substitute courses at Prince George's Community College to obtain his diploma. Although the child failed the necessary equivalency courses during the summer and fall 2010 semesters, he re-registered for the spring 2011 semester, completed the necessary courses, and received his diploma from his high school in June 2011.

The court granted appellant's motion, but used the post-October 1, 2010 child support guidelines to compute appellant's obligation, totaling a balance of $7,101. The court found that so long as the child was working towards his high school graduation, then child support continued to age nineteen.

Held: Affirmed.

The Court of Special Appeals held that the trial court was legally correct. The Court considered legislative history, dictionary definitions, and other jurisdictions' case law regarding the phrase, "enrollment in secondary school," and surmised that although the child was registered at Prince George's Community College, it was a limited, specific curriculum for the purpose of obtaining his high school diploma.

The Court was not concerned with the structural facility, but rather, the course of education being taught. Thus, the child's enrollment at Prince George's Community College constituted a broader view of obtaining his high school diploma by the means of an alternative, equivalency educational program.

Regarding the pre- and post- October 1, 2010 schedule, the trial court utilized a guidelines worksheet to calculate appellant's child support obligation, and found that after adding the parties' income, their adjusted actual income totaled more than the statute required. Therefore, the court did not abuse its discretion in calculating appellant's obligation, nor in utilizing the post-October 1, 2010 guidelines.

Edmund A. Cutts, Jr. v. Nancy L. Trippe, No. 1029, September Term 2011, filed December 20, 2012. Opinion by Berger, J.

http://mdcourts.gov/opinions/cosa/2012/1029s11.pdf

FAMILY LAW – DESTITUTE ADULT CHILD

Facts:

Edmund A. Cutts, Jr. ("appellant") and Nancy L. Trippe ("appellee") are the divorced parents of three children. The parties filed cross-motions to modify child support obligations. One of the issues was whether the parties' nineteen-year-old daughter, Sarah, was entitled to continuing child support as a destitute adult child within the meaning of Md. Code (1984, 2006 Repl. Vol.), §§ 13-101 and 13-102 of the Family Law Article ("FL"). Sarah was diagnosed with mild mental retardation at a young age, required constant supervision, and did not have a job. Appellant contended that Sarah was not destitute because she was the beneficiary of a trust with a value of approximately $400,000 ("the trust"). Additionally, the parties requested a modification of the support obligations for their minor children. Appellee argued that a decrease in appellee's salary and increases in her healthcare expenses for the children warranted a modification. Appellant claimed that his support obligation should be reduced due to increases in his healthcare expenses for the children and the decreased time the children spent with appellee due to their attendance at boarding schools. The circuit court issued a memorandum opinion finding that Sarah was a destitute adult child and thus entitled to continuing support from the parties. Additionally, the circuit court found that there had been a material change in circumstances due to appellee's decreased salary. Accordingly, the circuit court modified the child support obligations, adhering strictly to the child support guidelines contained in FL §§ 12-202 to 12-204 ("the Guidelines"). The circuit court also determined that the children's attendance at boarding schools did not warrant any modification, and that the increased healthcare costs to each party effectively cancelled each other out.

On appeal, appellant argued that the circuit court erred in finding that Sarah was a destitute adult child by: (1) failing to consider Sarah's trust fund in determining her status as a destitute adult child; (2) failing to make explicit findings of fact regarding Sarah's reasonable expenses; and (3) failing to conduct a balancing test in making its destitute adult child determination. Additionally, appellant argued that the circuit court erred by adhering strictly to the Guidelines in modifying the child support obligations.

Held: Affirmed.

The Court of Special Appeals held that the circuit court did not err in finding that Sarah was a destitute adult child. First, the circuit court properly excluded the trust from its analysis because the trust was not a resource currently available to Sarah. Appellee served as the trustee, and

could legitimately exercise her discretion not to distribute trust funds in order to ensure that Sarah would receive financial support when her parents were no longer able to provide for her. Additionally, there was no evidence that Sarah had any right to access the trust funds, nor had any funds been disbursed to Sarah. Accordingly, the circuit court was legally correct in excluding the trust from the destitute adult child analysis.

Second, the Court of Special Appeals held that the circuit court carefully considered the reasonableness of Sarah's expenses throughout the trial. The circuit court judge was not clearly erroneous in structuring his opinion with a summary of the testimony regarding reasonable expenses, rather than making explicit findings of fact regarding each expense.

The Court of Special Appeals also held that the circuit court did not err in its application of the destitute adult child statute by failing to compare Sarah's expenses to her resources. Sarah fit the classic statutory definition of "destitute," and, therefore, a balancing test was unnecessary. This is because the circuit court determined that Sarah had no job, received no disability benefits or other assistance, and had no other available financial resources.

Finally, the Court of Special Appeals held that the circuit court did not abuse its discretion in determining the amounts of the parties' child support obligations. Although the minor children attended boarding school, the children lived with appellee on weekends, holidays, and summer breaks. The circuit court properly concluded that it was not appropriate to reduce the child support amount under the Guidelines to reflect the reduced time the children spent at appellee's home, because appellee could not downsize to a smaller home. Likewise, the trial court appropriately excluded the trust in determining the amount of support for Sarah, because the trust funds were not available to Sarah.

TIG Insurance Company v. Monongahela Power Company, et al., No. 2842, September Term 2010, filed December 21, 2012. Opinion by Watts, J.

http://mdcourts.gov/opinions/cosa/2012/2842s10.pdf

CHOICE OF LAW – CONTRACT INTERPRETATION – INSURANCE POLICY – GENUINE DISPUTE OF MATERIAL FACT – SUMMARY JUDGMENT – SET-OFF – PRIMARY AND EXCESS INSURANCE POLICIES

Facts:

This case involves the Circuit Court for Washington County's grant of appellees'–Allegheny Energy, Inc., Monongahela Power Company, The Potomac Edison Company, West Penn Power Company, and Allegheny Energy Supply Company, LLC–motion for partial summary judgment, and the denial, in part, of appellant's–TIG Insurance Company–motion for partial summary judgment. The circuit court determined that there was no genuine dispute of material fact that the insurance policies at issue were made in Pennsylvania, where the policies were received and reviewed, and not in New York, where the insurer was headquartered. As such, the circuit court found that the law of the State of Pennsylvania governed construction of the policies.

Appellee, Allegheny Engery, Inc., a Maryland corporation, is the holding company of the other named appellees (collectively referred to as "Allegheny"). Since 1949, Allegheny has purchased both project specific and comprehensive general liability insurance policies from various insurers, including Certain Underwriters at Lloyd's, London and London Market ("London") and North River Insurance Company ("North River"). Appellant acts on behalf of North River by virtue of a power of attorney. Among nineteen general liability insurance policies that North River issued to Allegheny were four Excess Insurance Policies (the "Non-JU Policies"), covering a policy period from October 31, 1984, through October 31, 1985. The Non-JU Policies provided that the insurer agreed to indemnify Allegheny for loss exceeding the amount of loss payable by underlying policies over $5,000,000. Coverage under the underlying insurance policy began $500,000 and liability was limited to $1,000,000 for any one occurrence. Allegheny also purchased $3,500,000 in first layer excess insurance through two other insurers. On each of the Non-JU Policies, Allegheny's address is listed as "320 Park Avenue, New York, New York 10022[.]"

Beginning in 2003, Allegheny and its various insurers disputed liability under the policies. In a first amended complaint, Allegheny argued that it was due reimbursement under insurance policies purchased from North River and other insurers for costs incurred during litigation of asbestos claims.

Allegheny filed a motion for partial summary judgment requesting that the circuit court find Pennsylvania law applicable to the 1974 to 1980 London comprehensive general liability insurance policies and that, as a result, it (Allegheny) was entitled to select which policy (from

1974 to 1980) it would respond first in the asbestos suits. Allegheny contended that, since 1970, all of its insurance procurement functions were centralized in its Insurance Department, located in Greensburg, Pennsylvania. Allegheny asserted that, from 1970 to 1990 or 1991, its insurance broker was located in Pittsburgh, Pennsylvania. Allegheny argued that general liability policies issued to it in the 1970s and 1980s were delivered to it at its Insurance Department in Greensburg, Pennsylvania, and that, it was "not until the point that the insurance polic[ies] [were] actually physically received and reviewed by Allegheny" that it would pay the policy premiums and consider itself bound to the policies.

London filed a motion for partial summary judgment seeking that the circuit court find that New York law applied to the insurance policies. London argued that, between 1974 and 1984, when the London and North River Policies were signed, Allegheny's corporate headquarters were in New York City, the CEO, CFO, and all department heads worked out of New York City, and the board of directors met in New York City. London maintained that London policies signed between 1974 and 1980 were purchased through the EBASCO Insurance Services program, a company located in New York.

Appellant filed a motion for partial summary judgment requesting that the circuit court grant summary judgment as to certain claims contained in the first amended complaint. As to the choice of law issue, appellant joined in the arguments in support of the application of New York law as made by London. Appellant also sought partial summary judgment on the issue of whether North River was entitled to a set-off against Allegheny's asbestos liabilities "for all amounts covered by insurance policies with which Allegheny has settled its asbestos liability."

The circuit court held a hearing on the motions for partial summary judgment to consider, *inter alia*, the choice of law and set-off issues. Appellant joined in the arguments made by London without adding independent assertions as to the facts or law. The circuit court ruled that Pennsylvania law "applies to the construction and effect of all policies which are the subjects of this law suit." The circuit court initially deferred ruling on the issue of a set-off. The circuit court later declared that Pennsylvania law applied to the interpretation of "all insurance policies at issue in the case to [Allegheny's] coverage claims" and denied any motion to the contrary. Subsequently, the circuit court denied London's request for a set-off, and ruled that it would extend the order–concerning the set-off–to the Non-JU Policies.

Held: Affirmed.

Generally, the law of the state where a contract is made controls its validity and construction. A "contract is made in the place where the last act occurs necessary under the rule of offer and acceptance to give the contract a binding effect."

An insurance policy is a contract, and is to be treated and construed as any other contract. Absent a choice of law provision, matters regarding the validity and interpretation of an

insurance policy are controlled by the law of the state in which the policy is delivered and the premiums are paid.

That a company is headquartered in a state does not mean that all contracts, including insurance policies, which the company enters into are made in that state where evidence demonstrates that the insurance policy at issue was delivered to and premiums paid from a different state.

Where a party offers no information leading to the conclusion that insurance policies were delivered to the headquarters' state or that premiums were paid from that state, the party fails to establish that the policies were delivered and premiums paid in the headquarters' state, *i.e.* that the policies were made in the headquarters' state.

Where a party provided uncontested evidence that insurance policies were received and reviewed by its insurance department, located in Pennsylvania, via its broker in Pennsylvania, and where the other party offered no information leading to the conclusion that the policies were delivered to New York, where the company was headquartered, or that the premiums were paid from New York, the other party failed to generate a genuine dispute of material fact as to where the policies were made.

Where an insurance policy contains a clause requiring that the insurance company countersign the declarations page after the insured signs the declarations page and returns it to the insurance company, countersigning of the policy by the insurance company is not the last act necessary to give an insurance policy binding effect where the insured makes an offer to buy insurance coverage, the insurance company accepts the offer by writing, signing, and sending the policy to the insured, and the insured signs the declarations page and pays premiums after receipt of the policy.

In Pennsylvania, where multiple primary and excess insurance policies indemnify an insured for a single occurrence, a non-settling excess insurance policy is triggered only upon exhaustion of its directly underlying policies, either by settlement or payment. After the excess insurance policy is triggered and the insured indemnified, the insurers may determine liability among themselves. Determining the apportioned share of liability, or a set-off, requires examining the policies at issue and the state law governing the policies. A trial court may be required to deduct from the total loss the combined limits of all settling claims.

The Superior Court of Pennsylvania has held that, where an insured settled with one of several insurers liable under primary insurance policies for damages paid by the insured, "[t]he terms of the insurance policy will determine the amount of coverage that [the insurer] is obligated to pay." The Superior Court stated that, "[i]n the event that the policy contains an 'other insurance' or 'pro rata' clause, and the coverage for which [one insurer] is being held liable is covered by the insurance provided by [another insurer], [the first insurer] will be entitled to prorate the amount of coverage." Such reduction in the first insurer's liability would prevent it from being required to pay coverage for which other insurers were liable.

An excess insurance provider fails to establish its entitlement to a set-off where it requests the set-off without knowing whether it would be found liable for any coverage, without knowing the amount of any potential liability, and without information concerning the settling insurers' policies and the details of their liability.

It is not possible for a trial court to determine the pro rata shares of all settling insurers where no information exists concerning how many settling insurers there will be when a particular policy is triggered, or the total liability for which the settling insurers will be responsible, or the liability of the excess insurer.

Eric Roland v. Arlin Messersmith, Jr., No. 854, September Term 2010, filed November 29, 2012. Opinion by Kenney, J.

http://mdcourts.gov/opinions/cosa/2012/0854s10.pdf

REAL PROPERTY – INTERPRETATION OF A DEED

Facts:

In 2003, Mrs. Roland, a fee simple absolute owner of a parcel of farm property ("the property"), simultaneously reserved a life estate interest in the property to herself and conveyed the "remainder" to herself and her four children, David, Kirby, Eric, and Victoria, as joint tenants with right of survivorship. In 2005, Mrs. Roland, David, and Kirby conveyed their 3/5 interest in the property to a relative, Messersmith.

Later, after it emerged that, under the terms of the 2005 deed, Messersmith was not obligated to let Mrs. Roland, David, and Kirby continue to live on the property, Mrs. Roland filed suit to quiet title, arguing that the 2003 deed conveying to her both a life estate and a remainder interest in joint tenancy with right of survivorship was null and void as a matter of law and that the 2005 deed was obtained by fraud or coercion. Seeking to enforce the 2005 deed, Messersmith filed his own quiet title suit to establish his interest as a 3/5 tenant in common with Eric and Victoria, and to partition the property accordingly. Both suits were consolidated for trial.

Held: Affirmed.

As to the 2003 deed, the trial court held that a fee simple absolute owner of real property may simultaneously reserve a life estate interest in the property to herself and convey the "remainder" to herself and her four children, as joint tenants with right of survivorship. The appellate court affirmed, indicating that, in such circumstances, the "remainder" interest is effectively a contingent reversionary interest dependent upon Mrs. Roland surviving all four of her children.

The trial court found the 2005 deed valid and that decision was not appealed. By conveying their future interests to a third party in the 2005 deed, Mrs. Roland, David, and Kirby exercised their rights to transfer their future interests, and in doing so severed the joint tenancy created by the 2003 deed and eliminated the survivorship contingency with respect to their future interests. Under that deed, Messersmith held a possessory estate for the life of Mrs. Roland. In addition, Messersmith acquired the concurrent future interests held by Mrs. Roland, David, and Kirby. Messersmith, as a third-party grantee, held those non-contingent remainder interests as a tenant in common with Victoria and Eric.

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ATTORNEY DISCIPLINE

By a Per Curiam Order of the Court of Appeals dated December 3, 2012, the following attorney has been indefinitely suspended:

ROBERT WESTON MANCE, III

*

By a Per Curiam Order of the Court of Appeals dated December 4, 2012, the following attorney has been disbarred:

MARK EDWARD HUNT

*

By an Order of the Court of Appeals dated December 6, 2012, the following attorney has been suspended by consent:

PATRICK EDWARD VANDERSLICE

*

By an Order of the Court of Appeals dated November 14, 2012, the following attorney has been disbarred by consent, effective December 14, 2012:

SHAKYAMUNIRE SHIVA ARATI

*

This is to certify that

GEORGE GUILD STROTT

has been replaced on the register of attorneys in this state as of December 14, 2012.

*