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Facts: The disciplinary action against Joseph M. Guida ("Respondent") arose out of his representation of Mr. and Mrs. Danny Lee Bird in an adoption matter. The Attorney Grievance Commission of Maryland ("Petitioner") charged Respondent with violating Rules 1.1 (Competence), 1.3 (Diligence), 1.4(a) and (b) (Communication), 1.5(a) (Fees), 1.15(a) (Safekeeping Property), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(c) and (d) (Misconduct) of the Maryland Rules of Professional Conduct ("MRPC"); and Maryland Rule of Procedure 16-812.

Respondent charged, and was paid, a fee of $735.00 by the Birds. He failed to file the petition for adoption. Moreover, he prepared a fake adoption decree and forged a judge's signature that he represented to the Birds was legitimate. He did not contest that he violated most of the rules as charged. In mitigation, Respondent offered evidence, medical and lay, that he suffered from a severe major depression at the time of the misconduct and therefore should not be disbarred. Bar Counsel sought disbarment. The hearing judge determined that, with minor exception, the mitigation evidence did not satisfy the standard of Attorney Grievance Comm'n v. Vanderlinde, 364 Md. 376, 773 A.2d 463 (2001). Exceptions were taken by both parties to the Court of Appeals.

Held: Disbarred. The Court of Appeals determined that disbarment was warranted where Respondent violated MRPC 1.1, 1.3, 1.4(a), 1.5(a), 1.15(a), 8.1(b), and, most significantly, 8.4(c) and (d), in connection with Respondent's falsification of an adoption order and judge's signature. The Court maintained that, in cases of intentional dishonesty, deceit, or misrepresentation, the ordinary sanction of disbarment shall not be diluted unless the proof of mitigation satisfies the significant threshold for excusing or mitigating a sanction for such conduct, based on the attorney's mental or physical condition at the time of the misconduct, as outlined in Vanderlinde. In the present case, Respondent's severe major depression (and related sequelae), while it may have satisfied a "but for" causation standard, was not so great that it satisfied the Vanderlinde threshold for mitigation of the sanction for his violations of the MRPC. Accordingly, the Court of Appeals determined that disbarment was the appropriate sanction.

Attorney Grievance Commission v. Joseph M. Guida, Misc. Docket AG No. 17, September Term, 2004, filed February 7, 2006. Opinion by Harrell, J.

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CIVIL PROCEDURE - DECLARATORY JUDGMENT ACTION - DISMISSAL OF COMPLAINT

Facts: Appellant Secure Financial Service, Inc., a Maryland corporation entered into a contract with Norvergence Communications, Inc., a New Jersey corporation. Under the agreement, Norvergence was to provide various telecommunications equipment and services to Secure Financial over a five-year period. Five days later, Norvergence assigned the contract to appellee Popular Leasing USA, Inc, a Delaware corporation with its principal place of business in Missouri. Norvergence subsequently entered bankruptcy and allegedly ceased to provide appellant with telecommunications service. Appellant did not make a monthly payment due under the agreement, and appellee then declared the contract in default and accelerated the balance due under the contract.

Secure Financial filed a declaratory judgment action in the Circuit Court for Frederick County, seeking a declaration that the applicable law provision of the agreement between Secure Financial and Norvergence was unenforceable, and that, the agreement itself was unenforceable.

The applicable law provision of the agreement provides, in pertinent part, that the venue for any legal action arising out of the contract shall be in the state or federal court where the lessor's principal place of business is located, or if the contract is assigned by the lessor, the state or federal court where the assignee's principal place of business is located, to be determined by the lessor or the lessor's assignee.

The trial judge concluded that action should have been brought in Missouri, the location of appellee's principal place of business and instead of declaring the rights and obligations of the parties, dismissed the complaint. The Court of Appeals granted certiorari on its own initiative to address the question presented in Secure Financial's appeal: whether the trial court erred in enforcing the choice-of-law provision.

Held: Reversed and remanded. The Court held that the trial court erred in dismissing appellant's Complaint and failing to declare the rights and obligations of the parties under the agreement between Norvergence and Secure Financial.

The Court pointed out that the Maryland Rules and Court of Appeals precedent require that when a declaratory judgment action is brought, and the controversy is appropriate for resolution by declaratory judgment, the Circuit Court must enter judgment in a separate document, declaring the rights and obligations of the parties. A memorandum opinion, standing alone, is insufficient.

Although the Court reversed and remanded the matter for further proceedings, the Court did discuss the law generally with respect to the enforcement of choice of law provisions as well as specific citations to litigation around the country pertaining to Norvergence Communications.

Secure Financial Service, Inc. v. Popular Leasing USA, Inc. No. 34, September Term, 2005, filed February 10, 2006. Opinion by Raker, J.

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CONTRACTS - CONSTRUCTION AND OPERATION - CONDITIONS - FINANCING CONTINGENCY CLAUSES IN CONTRACTS FOR SALE OF REAL PROPERTY

CONTRACTS - CONSTRUCTION AND OPERATION - SUBJECT MATTER - ATTORNEY'S FEES

Facts: Appellants, Steven C. Myers and Linda Barrett, contracted on April 12, 2002 with appellees, Douglas Kayhoe and Ruth Ann Kayhoe, to purchase real property. The purchase agreement between the parties contained a financing contingency clause, providing that the contract was contingent upon appellants obtaining financing in the form of a 30 year loan for $245,000.00 at 7% interest. The purchase agreement further provided that "Buyer agrees to make written application for the financing herein described within five (5) days from the date of Contract Acceptance," and that the contract was null and void if "such written financing commitment is not obtained by Buyer within thirty (30) days." The contract also provided that, in the event of litigation under the contract between the parties, the prevailing party in such litigation "shall be entitled to receive reasonable attorney's fees from the other party as determined by the court or arbitrator." The purchase was also made contingent upon appellants' sale of their current residence. Closing was set for June 21, 2002. Appellants paid a $2000.00 security deposit.

Although appellants had a contract for the sale of their current home prior to contracting with appellees, they released the prospective buyers from this contract. Consequently, the parties executed a new addendum on May 4th, revising the sale contingency clause to specify that the contract was contingent upon appellants getting their current home under contract by May 24th. The language of the revised sale contingency clause expressly provided that time was of the essence.

Appellants did not obtain a new contract for the sale of their current home until after May 24th. On June 6th, the parties executed what they styled as a new "addendum" to the contract, which provided that "all parties agree and understand that the contract of sale dated 4/12/02 will be hereby re-enacted with revisions and all other terms and conditions will remain in full force."

On June 6th, appellants initiated an application to NovaStar Financial for a financing commitment, but their application was ultimately rejected by NovaStar on June 24th after an internal review of the appraisal of the sale property revealed that it was too

high. Appellants did not make any subsequent attempts to obtain a financing commitment, and appellees later sold the property to another party.

In March 2004, appellees brought suit against appellants in the Circuit Court for Queen Anne's County, seeking to recover the difference between the contract price under the contract with appellees and the price the property was sold for. Appellants countersued for return of their security deposit and attorney's fees. The Circuit Court entered judgment for the appellants on the issue of the deposit, but refused to award appellants any attorney's fees.

Held: Affirmed in part, reversed in part, and remanded. The Court held that the trial court properly granted summary judgment to the appellants on the issue of the deposit. Appellees presented two arguments that summary judgment was improper, claiming that there were remaining issues of material fact as to whether (1) appellants failed to fulfill their implied obligations under the financing contingency clause to take bona fide, reasonable, and prompt action to obtain the specified financing because they only made one application for a financing commitment, and as to whether (2) appellants waived the financing contingency clause because they told their real estate agent that "the loan's in place."

The Court rejected appellees' first argument on grounds that the express language of the financing contingency clause only obligated appellants to make one application for a financing commitment. Applying the principle of contract interpretation that express terms of a contract trump inconsistent implied terms relating to the same aspect of the contract, the Court held that, to the extent the implied obligation to take bona fide, reasonable, and prompt action to obtain the financing in a financing contingency clause would have required appellants to make more than one application for a financing commitment in the absence of the express language of the contract obligating appellants to make only one application for a financing commitment, this implied obligation was negated by the express language of the contract. Consequently, summary judgment in favor of the appellants was proper on this issue, as there was no dispute of material fact as to whether appellants had made one good faith application for a written financing commitment for the financing specified in the financing contingency clause.

The Court also rejected appellees' waiver argument. Appellant's waiver argument was premised entirely upon the evidence in the record that appellants told their real estate agent that "the loan's in place." The Court held that summary judgment in favor of the appellants on the waiver issue was proper because there was no evidence giving rise to an inference that the agent's comment was relayed to the appellees. In the absence of such evidence in the record, no rational trier of fact could conclude that appellants expressly or impliedly waived the benefits of the financing contingency clause, as such waiver would require some manifestation by the appellants to the appellees of an intent to forego the benefits of the clause.

Finally, the Court held that the trial court's failure to award appellants any reasonable attorney's fees was reversible error. The plain language of the contract

entitled the appellants, as the prevailing parties in litigation under the contract, to an award of reasonable attorney's fees from the court. The Court noted that the trial court's conclusion that appellants were not entitled to any attorney's fees because the June 6th addendum created a new contract was incorrect, because the new contract that arose as a result of the addendum contained exactly the same attorney's fees provision as did the original contract.

Steven C. Myers, et al. v. Douglas Kayhoe, et al., No. 35, September Term, 2005, filed February 9, 2006. Opinion by Raker, J.

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COURTS - PERSONAL JURISDICTION - LONG-ARM JURISDICTION - CONSPIRACY THEORY OF PERSONAL JURISDICTION

Facts: This case presents a question of law certified by the United States District Court for the District of Maryland. Appellee Compass marketing filed suit in the United States District Court for the District of Maryland against appellants, James J. Mackey and Samuel Severino, and against Schering Plough Corp., various subsidiaries of Schering-Plough, and Wyeth. The complaint alleged that appellants and other defendants had entered into a conspiracy to reduce the brokerage commissions paid to appellee by Schering-Plough and Wyeth for sales of Schering-Plough and Wyeth pharmaceuticals. Appellants moved to dismiss the complaint on grounds that Appellee lacked personal jurisdiction over them under the Maryland long-arm statute, Md. Code (1974, 2002 Repl. Vol., 2004 Cum. Supp.), § 6-103(b) of the Courts and Judicial Proceedings Article. The

District Court certified two questions of law to the Court of Appeals, asking the Court to determine whether Maryland law recognizes the conspiracy theory of personal jurisdiction, and, if so, what elements must be alleged under that theory.

Held: The Court recognized the conspiracy theory of jurisdiction as a basis for obtaining involuntary personal jurisdiction over an out-of-state defendant. The Court recognized the version of the conspiracy theory detailed in Cawley v. Bloch, 544 F. Supp. 133 (D. Md. 1982), which provides that when "(1) two or more individuals conspire to do something (2) that they could reasonably expect to lead to consequences in a particular forum, if (3) one co-conspirator commits overt acts in furtherance of the conspiracy, and (4) those acts are of a type which, if committed by a non-resident, would subject the non-resident to personal jurisdiction under the long-arm statute of the forum state, then those overt acts are attributable to the other co-conspirators, who thus become subject to personal jurisdiction in the forum, even if they have no direct contacts with the forum."

The Court first considered whether the conspiracy theory of jurisdiction is consistent with the Due Process Clause of the Fourteenth Amendment. The Court

answered this question in the affirmative, drawing an analogy to the "stream of commerce" theory endorsed by the Supreme Court in World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980). In World-Wide, the Supreme Court endorsed the view that a plaintiff could obtain personal jurisdiction over an out-of-state defendant in a particular forum if the out-of-state defendant placed a product that gave rise to the action in the stream of commerce, and the out-of-state defendant could reasonably anticipate facing suit in the forum as a result of placing the product in the stream of commerce. The Court, following World-Wide, concluded that the conspiracy theory of personal jurisdiction is consistent with due process because the requirements of the theory ensure that the only acts attributed to a co-conspirator under the theory are acts that the co-conspirator could reasonably anticipate would lead to suit in the forum at issue.

The Court then concluded that the conspiracy theory of personal jurisdiction is recognized under the Maryland long-arm statute. The Court first noted that existing precedent clearly establishes that the Maryland long-arm statute is to be construed, if possible, to give Maryland courts long-arm jurisdiction to the maximum extent permitted by due process. The Court then concluded that when the requirements of the conspiracy theory are met, one co-conspirator is the "agent" of the other co-conspirator within the meaning of the long-arm statute.

James J. Mackey and Samuel Severino v. Compass Marketing, Inc., Misc. No. 4, September Term, 2005, filed February 9, 2006. Opinion by Raker, J.

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CRIMINAL LAW - BREACH OF PLEA AGREEMENT - EVIDENCE - ADMISSIBILITY OF STATEMENTS

Facts: Appellee Pitt was arrested in connection with a burglary. He entered into a plea agreement that specified that any statements by the defendant could be admitted at trial if defendant breached. When it became known that defendant was not being truthful during plea negotiations, the government informed defense counsel that the plea was null and void. Defendant's statements were admitted at the burglary trial and he was convicted. The Court of Special Appeals reversed, holding that when the State rescinded the agreement, statements obtained under it became inadmissible.

Held: Judgment Affirmed. Under Maryland Rule 5-410, statements made by the accused during plea negotiations are generally inadmissible. There have been exceptions. Wright v. State, 307 Md. 552, 515 A.2d 1157 (1986), held that when the plea

agreement provided that, in the event of breach, defendant's inculpatory statements would be used against him at trial, and the defendant breached and the government neither rescinded nor breached, those statements were admissible against the defendant. Allgood v. State, 309 Md. 58, 522 A.2d 917 (1987), held that when the plea agreement did not include a provision regarding the admissibility of defendant's statements upon breach, and the State repudiated the agreement, for whatever reason, those inculpatory statements were inadmissible at trial.

This case presented a question regarding the admissibility of statements obtained under a plea agreement which included a provision regarding the admissibility of defendant's statements upon breach, a plea agreement that the State repudiated upon defendant's breach. Allgood is clearly applicable, and statements obtained pursuant to a plea agreement containing a provision that defendant's statements are admissible at trial if the defendant breaches the agreement are inadmissible where the State repudiates the plea agreement. The justification for the repudiation goes to whether the plea agreement should be enforced, not to the admissibility of the statements obtained under it.

State v. Pitt, No. 99, September Term, 2003, filed January 31, 2006. Opinion by Bell, C.J.

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CRIMINAL LAW - DEATH PENALTY - CONSTITUTIONAL LAW - SIXTH AMENDMENT RIGHT TO JURY TRIAL - ARTICLES 5, 21, AND 24 OF THE MARYLAND DECLARATION OF RIGHTS - RECORD OF VOLUNTARY AND KNOWING WAIVER OF JURY TRIAL RIGHT - STATUTORY RIGHT TO JURY SENTENCING - RECORD OF VOLUNTARY AND KNOWING WAIVER OF JURY SENTENCING RIGHT - REQUEST FOR CONTINUANCE - FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION - CUSTODIAL INTERROGATION - FOURTH AMENDMENT RIGHT AGAINST UNREASONABLE SEARCH AND SEIZURE - CONSENT TO SEARCH AND SEIZE PROPERTY - PROBABLE CAUSE NEEDED TO ISSUE WARRANT TO SEARCH AND SEIZE PROPERTY - IMPROPER INCREASE OF SENTENCE IN VIOLATION OF RULE 4-345 - MERGER OF KIDNAPPING AND CHILD KIDNAPPING CONVICTIONS FOR SENTENCING PURPOSES

Facts: Jamaal Kenneth Abeokuto was convicted, following a bench trial, of first-degree murder, first-degree assault, kidnapping, child kidnapping, extortion, and wearing or carrying a dangerous weapon openly with the intent to injure in the death of the eight-

year old daughter of his female romantic interest. According to the State's evidence at trial, Abeokuto abducted the child victim on 3 December 2002, took her to a wooded area in Harford County, and killed her by slitting her throat and kicking her head.

After charging in Harford County, the Circuit Court for Harford County granted Abeokuto's request for a change of venue, citing pre-trial publicity in Harford County, and transferred the case to the Circuit Court for Baltimore County. Immediately after the completion of competency proceedings, where the court received testimony and evidence regarding Abeokuto's mental health and medication state (Abeokuto had been prescribed Geodon, an anti-psychotic medication, while incarcerated prior to trial), Abeokuto elected to waive his right to trial by jury. The court convicted Abeokuto on all counts.

Abeokuto also elected to waive his right to sentencing by jury. The court sentenced him as follows: death for the murder conviction; merged for sentencing purposes the first degree assault count with the murder count; ten years of incarceration, to be served from the initial date of Abeokuto's arrest, for the extortion conviction; thirty years of imprisonment for the kidnapping conviction, consecutive to the sentence for extortion; three years for the deadly weapon conviction, to be served consecutive to the extortion and kidnapping sentences; and twenty years to be served for child kidnapping, to run concurrently with the sentences for the extortion, kidnapping, and deadly weapon convictions. At the sentencing hearing, the court stated, as to the sentence for murder, that it found two statutory aggravating circumstances proved beyond a reasonable doubt, kidnapping and child kidnapping. The court found as a mitigator, by a preponderance of the evidence, that Abeokuto had not been found guilty previously of a crime of violence. Penultimately, the court determined that the State had proven by at least a preponderance of the evidence that the aggravating circumstances outweighed the mitigating circumstances. It therefore imposed the sentence of death for the murder conviction. The sentence of ten years for the extortion conviction was later amended in the Commitment Report and the Trial Judge's Post-Sentencing Report to reflect that it was to be served consecutive to the sentence for the murder conviction.

Held: Convictions affirmed; sentencing vacated. A majority of the Court of Appeals affirmed Abeokuto's convictions. The Court, by a majority concurring, concluded that the imposition of the death penalty was not influenced by passion, prejudice, or other arbitrary factor. In addition, a majority of the Court held, after considering the totality of the circumstances, that the record in the present case demonstrated a knowing and voluntary waiver of Abeokuto's right to a jury trial. Defense counsel, prosecutor, and the trial court asked Abeokuto a total of seven times during the colloquy whether he understood the various explanations given of his rights and jury trial process. Abeokuto was represented by counsel, who, prior to the hearing, had discussed with Abeokuto the decision whether to elect a court or jury trial. The Court also concluded that no facts from the record demonstrated that the court had reason to ask Abeokuto whether he had been coerced or threatened to waive his right to a jury trial or whether anyone, including defense counsel or the prosecutor, promised Abeokuto anything in exchange for his waiver. Therefore, questions directed to those areas were not required in this case. While the trial court was aware that Abeokuto may have been

taking a prescription medication and that Abeokuto's mental health had been an issue earlier in the proceedings, the Court determined that the trial court's failure to ask anew about these particular facts during the colloquy was not error at that point in the proceedings when the jury trial waiver was given.

Under the plain error standard, the Court of Appeals declined to review Abeokuto's unpreserved claim that the trial court committed error by admitting testimony at trial by a Special Agent of the FBI who informed the court that Abeokuto was read Miranda warnings and chose to remain silent when arrested in Alabama. The Court also concluded that the lower court's decision to deny Abeokuto's request for continuance was not an abuse of discretion because it found a reasonable basis for the lower court's decision. Moreover, the lower court committed no error when it admitted Abeokuto's statement obtained at the police station, without the receipt of a Miranda warning, because the statement was not a product of a custodial interrogation. Abeokuto was not arrested during the questioning and no reasonable person would have been led to believe to the contrary.

The record revealed no coercion throughout the interrogation, either during the interrogation at issue or the eleven hours before the relevant interrogation. He agreed to answer questions and did so cooperatively. He was not deprived of his freedom of action in any significant way. The lower court also committed no error when it admitted clothing obtained from Abeokuto at the police station because he consented to the search and seizure by silently unbuckling and lowering his pants so that detectives could observe the label of his jean pants, and, in response to a request by police for the clothing, removing all of his clothing and laying it on the table. In addition, the Court determined that lower court committed no error when it admitted the fruits of a search of Abeokuto's car because the affidavit in support of the search warrant provided probable cause for the search when it stated that Abeokuto was the last person to see the victim alive and demonstrated that his statements were inconsistent with the statements of others.

The Court vacated the sentences and remanded the case to the trial court for a new sentencing proceeding. Because of an unusual divergence of views among the members of the Court regarding the sentencing issues, however, there was no majority view on all of those issues. Three members of the Court would have vacated the sentencing because the record did not demonstrate a knowing and voluntary waiver of the jury sentencing right because the trial court, in view of the relatively long passage of time since the competency determination proceeding, failed to inquire anew into Abeokuto's medication state and consider its impact on his ability to give a knowing and voluntary waiver when the facts of the case raised that issue. A fourth member of the Court would vacate the sentencing proceeding for other reasons. A majority of the Court also found error in the sentencing in that the trial court illegally increased Abeokuto's sentence for extortion by its Amended Commitment Order, in violation of Maryland Rule 4-345, and failed to merge the kidnapping and child kidnapping convictions for sentencing purposes.

Abeokuto v. State, No. 129, September Term, 2004, filed February 13, 2006. Opinion by Harrell, J.

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CRIMINAL LAW – SENTENCING - The appropriate commencement date of a sentence, prior to 1994, for crime(s) committed while on parole and parole has not been revoked, commences on the date imposed.

CRIMINAL LAW – SENTENCING - For sentencing purposes, parole is not analogous to incarceration or a term of confinement.

Facts: On February 1, 1972, the Circuit Court for Baltimore City sentenced Pearson to a twenty-year term of imprisonment, to commence on August 3, 1971, for robbery with a deadly weapon. On June 1, 1977, the Maryland Parole Commission (MPC) paroled Pearson. On March 29, 1978, the MPC issued a retake warrant for Pearson. Pearson was arrested and incarcerated in Baltimore City.

On February 27, 1979, Pearson was sentenced in the Circuit Court for Baltimore City to a twenty-year term of incarceration for second-degree murder, to run "consecutive with any sentence on violation of parole [sic]" and a ten-year term for use of a handgun during the commission of a felony, consecutive to the second-degree murder sentence. Pearson was also sentenced to three years imprisonment for unlawfully carrying a handgun, to be served concurrently.

After his sentence, on April 10, 1979, the MPC revoked Pearson's parole, ordering him to serve the balance of the original 1972 sentence, less "street time" credit. The Division of Correction's (DOC's) adjusted maximum expiration date on Pearson's original 1972 sentence was August 28, 1992. After completion, his 1979 sentence would commence on August 28, 1992, and expire on November 24, 2021. The maximum expiration date was "the date that the term of confinement expires."

On July 15, 2004, Pearson filed a writ of habeas corpus in the Circuit Court for Washington County requesting an immediate release from incarceration, alleging that "at common law, a sentence imposed consecutively to a parole violation term commences on the date of imposition if, at the time of sentencing, parole has not yet been revoked." Pearson's habeas corpus hearing was held on September 23, 2004. On September 30, 2004, the circuit court judge ordered Pearson released from custody and found that, "at common law, a sentence imposed consecutively to a parole violation term commences on the date of imposition if, at the time of sentencing, parole has not yet been revoked."

The DOC appealed. The Court of Special Appeals, in an unreported opinion, affirmed the trial court's judgment and held that if parole is not revoked prior to the imposition of a new consecutive sentence, parole cannot be considered a term of confinement. The Court of Appeals granted DOC's petition for writ of certiorari.

Held: The decision of the Court of Special Appeals is affirmed. The Court determined that a sentencing judge, at the time of sentencing, should determine what other unsuspended sentences of confinement or actual sentences of confinement exist, in order to relate the current sentence to any previous sentence. However, when a parolee is sentenced for a new crime before revocation of parole, a sentencing judge may not consider parole as a term of confinement, and, as such, a new sentence may not be served consecutive to a parole term. When imposing a consecutive sentence for a new offense, a sentencing judge should not consider parole as an existing sentence being served.

The Court held that parole is not a sentence in esse, and is not analogous to incarceration for sentencing purposes. Thus, if a parolee commits an offense and the sentencing judge imposes a new sentence before revocation of parole, the new sentence commences on the date of imposition. As a result of this analysis, the Court held that Pearson's thirty-year sentence commenced on February 27, 1979, the date his sentence was imposed.

J. Michael Stouffer, Warden v. James L. Pearson, No. 1, September Term, 2005, filed December 8, 2005. Opinion by Greene, J.

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TAXATION - TAX CREDIT – SECTION 10-703(a) DOES NOT APPLY TO LOCAL INCOME TAX. The Circuit Court for Baltimore County erred in its interpretation of Section 10-703(a) of the Tax-General Article. The Maryland Tax Court was correct in affirming the Comptroller's decision that the tax credit against State income taxes applied exclusively to reduce State income taxes. We hold that the tax credit may be applied only to reduce the amount of a Maryland resident's State income tax liability and that the credit, pursuant to Section 10-703(a), does not reduce the amount owed by a Maryland resident for local income tax.

Facts: In 2001, Edward L. and Estelle E. Blanton ("the Blantons"), were residents of Baltimore County, Maryland and owned property in North Carolina. The Blantons calculated their Maryland taxable net income and their local Baltimore County tax and were allowed a tax credit toward the State income tax only under the Maryland tax formula for taxes paid toward their North Carolina income tax. The Blantons, however, subtracted the North Carolina income tax amount from the total of their State and local

income taxes and paid the difference in taxes owed to Maryland. They enclosed a letter with their Maryland taxes challenging the format of their Maryland tax return, Form 502, which calculated State and local income taxes independently of each other. The Blantons claimed that this was a violation of the State's policy against double taxation and that the tax credit described in the language of Maryland Code (1998, 2004 Repl. Vol.), § 10-703(a) of the Tax-General Article, allowed for a credit towards state and local income taxes. In an informal hearing, the Maryland Comptroller of the Treasury ("Comptroller") required the Blantons to pay their outstanding tax balance including the portion of the local income tax that was subtracted from the Blantons' calculations. The Comptroller opined that the Legislature intended a credit against the State income tax only. The Maryland Tax Court affirmed the Comptroller's finding and determined the Legislature had defined State and local taxes as two distinct taxes. The Circuit Court of Baltimore County reversed the Tax Court's decision and held that an ambiguity existed with the term "State income tax," therefore, the definition included local income tax for purposes of the tax credit under § 10-703(a) of the Tax-General Article. After a hearing in the Circuit Court, the hearing judge reversed the decision of the Tax Court. The Comptroller appealed that decision to the Court of Special Appeals. Before that court could decide the appeal, on our initiative we issued a writ of certiorari.

Held: Reversed. There was a clear legislative intent to limit the credit to State income tax for Maryland residents who also pay income tax to another state. The plain language of § 10-703(a) of the Tax-General Article which states that a resident is allowed a credit only against State income tax is unambiguous. The plain meaning of the statute is that the local income tax is excluded and only State income tax may be offset or reduced. The tax credit is further limited under Maryland Code (1988, 2004 Repl. Vol.), § 10-706 of the Tax-General Article which clarifies the applicability of tax credits.

Comptroller of the Treasury v. Blanton, et al., No. 15, September Term, 2005, filed January 12, 2006. Opinion by Greene, J.

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WORKERS' COMPENSATION COMMISSION DECISION – APPEAL UNDER § 9-745 OF THE LABOR AND EMPLOYMENT ARTICLE – REQUEST FOR DE NOVO JURY TRIAL – MOTION FOR SUMMARY JUDGMENT

Facts: William A. Kelly, III (Kelly), a Baltimore County police officer, while operating his police cruiser in the line of duty, was involved in a motor vehicle accident with a drunk driver. Kelly filed a claim with the Workers' Compensation Commission (the Commission) asserting that a required surgery to his lower back was linked directly

to the motor vehicle accident. Because Kelly acknowledged that the accident aggravated a prior back injury, his employer, Baltimore County (County), argued that the surgery was a consequence exclusively of the pre-existing back injury, not the employment-related motor vehicle accident. The Commission determined that "the accidental injury sustained . . . exacerbated [Kelly's] pre-existing condition requiring the need for back surgery," and thus ordered benefits be paid to Kelly.

The County "appealed" the Commission's decision to the Circuit Court for Baltimore County, filing a Petition for Judicial Review and requesting a jury trial. The County followed with a Motion for Summary Judgment, relying solely on the record made before the Commission, claiming that there was "no medical evidence to support [Kelly's] claim that his back surgery . . . and subsequent treatment [was] in any way related to the . . . motor vehicle accident." It argued that Kelly, under S.B. Thomas, Inc. v. Thompson, 114 Md. App. 357, 689 A.2d 1301 (1997), was required to prove causation because his claim involved a complex medical question. Asserting that Kelly failed before the Commission to meet that burden by competent medical evidence, the County claimed entitlement to judgment as a matter of law in the Circuit Court. The trial court granted the County's Motion for Summary Judgment, thus reversing the Commission's decision in favor of Kelly.

On Kelly's direct appeal, the Court of Special Appeals, in a reported opinion, Kelly v. Baltimore County, 161 Md. App. 128, 867 A.2d 355 (2005), reversed the judgment of the Circuit Court and remanded the case for further proceedings. The Court of Special Appeals concluded that "when the appealing employer files a motion for summary judgment asserting an argument that requires a resolution of an issue of fact, and the underlying facts are susceptible of more than one permissible inference, because the claimant enjoys the presumption of correctness of the Commission's decision [under § 9-745 of the Labor and Employment Article], summary judgment is not appropriate." The intermediate appellate court stated also that, even if the question of causation was a complicated medical issue, "the County, as the party attacking the presumption of the Commission's decision, bore the obligation of proving the absence of causation." The Court of Appeals granted the County's Petition for Writ of Certiorari to determine whether summary judgment was granted properly by the Circuit Court.

Held: Affirmed. The Court of Appeals affirmed the judgment of the Court of Special Appeals. While acknowledging that the general standards for determining whether summary judgment is appropriate are well established, the Court considered the impact thereon of § 9-745 of the Labor and Employment Article of the Maryland Code (1991, 1999 Repl. Vol.) in workers' compensation cases. Section 9-745 provides the procedure for the conduct of proceedings in a circuit court for "appeals" from decisions of the Workers' Compensation Commission. Under the provision, a non-prevailing party before the Commission may seek review in a circuit court by either proceeding on the record made before the Commission (much like judicial review of the final action of most state administrative agencies) or receive a new evidentiary hearing and decision before a jury (much like an original civil complaint brought in a circuit court). Under either process elected in a circuit court by a party that did not prevail before the Commission,

the agency's decision nonetheless is entitled to a presumption of correctness that must be overcome.

The Court of Appeals determined summary judgment was granted inappropriately by the Circuit Court. The Circuit Court granted the County's/employer's motion, which relied entirely on the record made before the Commission, based on the perceived failure of the claimant to have adduced expert medical evidence before the Commission regarding an alleged complex medical causation question. The Court of Appeals, however, determined that, given the Commission's decision in favor of Kelly, the burden of proof rested with the County in the Circuit Court. See § 9-745(b)(2). This burden on the County obliged it to produce evidence regarding the lack of causation between the motor vehicle accident and Kelly's back surgery. Kelly, therefore, was not required, at that stage of the Circuit Court proceedings, to adduce medical evidence, if any, establishing causation between the motor vehicle accident and the surgery.

Baltimore County, Maryland v. William A. Kelly, III, No. 17, September Term, 2005, filed February 7, 2006. Opinion by Harrell, J.

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# COURT OF SPECIAL APPEALS

ADMINISTRATIVE LAW - MOOTNESS – EXCEPTIONS TO MOOTNESS – MEDICAID – MEDICAL ASSISTANCE – FAIR HEARING – ADMINISTRATIVE LAW JUDGE – COMAR – 42 CFR – STATE REVIEW TEAM

Facts: Appellant, Albert S., applied for Medical Assistance benefits on October 1, 2002. The State Review Team ("SRT") determined that he was not disabled, and the Department of Health and Mental Hygiene, Baltimore County Department of Social Services, appellee, denied his application. Appellant appealed and, after an evidentiary "fair hearing" to review the matter, at which medical evidence was presented, the administrative law judge ("ALJ") remanded to the SRT for reconsideration in light of the evidence presented at the hearing. Appellant then appealed to the Board of Review of the Department of Mental Health and Hygiene, which affirmed. After appellant sought judicial review in the Circuit Court for Baltimore County, the court dismissed the appeal as moot because, in the interim, appellant had reapplied for Medical Assistance, was found eligible as of October 1, 2003, and was not financially responsible for medical expenses incurred prior to his approval.

Held: Reversed. Although the case was technically rendered moot by appellant's receipt of Medicaid, the Court was of the view that the public importance of the issue warranted appellate consideration.

The ALJ erred in remanding the matter to the SRT for further consideration of medical evidence presented at the hearing. Federal and state law governing Medical Assistance based on a disability require that, upon consideration of sufficient evidence presented at a "fair hearing" as to disability, the ALJ must render a final decision as to a person's eligibility for benefits. Once an applicant contests the SRT's determination, it is the ALJ's responsibility to render a final decision in the matter, provided that the evidence is sufficient.

Albert S. v. Department of Health and Mental Hygiene, No. 02465, September Term, 2004, filed February 1, 2006. Opinion by Hollander, J.

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CONTRACTS - ANTICIPATORY REPUDIATION - MARYLAND CODE (2003 REPL. VOL., 2005 SUPP, COMMERCIAL LAW I ARTICLE, § 2-611 - RETRACTION

OF ANTICIPATORY REPUDIATION, §§ 2–609 AND 2–610 - RIGHT TO ADEQUATE ASSURANCE OF PERFORMANCE AND ANTICIPATORY REPUDIATION; C. W. BLOMQUIST AND CO. INC. v. CAPITAL AREA REALTY INVESTORS CORP., 270 MD. 486 (1973); TRIAL COURT PROPERLY CONCLUDED THAT APPELLANT REPUDIATED CONTRACT FOR THE MANUFACTURE AND DELIVERY BY APPELLEE TO APPELLANT OF RADIOLOGY EQUIPMENT FOR RESALE AND THAT, BECAUSE APPELLEE CHANGED ITS POSITION AFTER RECEIVING TELEPHONE CALL FROM APPELLANT DISPARAGING APPELLEE'S MANUFACTURED PRODUCT, APPELLANT COULD NOT RETRACT REPUDIATION WITHOUT PROVIDING FURTHER ASSURANCES PURSUANT TO § 2–609; CIRCUIT COURT ALSO PROPERLY CONCLUDED THAT, NOTWITHSTANDING APPELLANT'S CLAIM THAT THE COURT ERRED IN CONSIDERING ITS FAILURE TO PAY PURSUANT TO CONTRACT FOR MANUFACTURE AND DELIVERY OF 195 UNITS, WHICH WAS SEPARATE FROM INITIAL CONTRACT FOR MANUFACTURE AND DELIVERY OF 5,000 UNITS, APPELLANT'S RECEIPT OF THE UNITS FOR THEIR RESALE, WITHOUT PAYING APPELLEE, CONSTITUTED APPELLEE'S ACCEPTANCE OF GOODS BY ACTING IN A MANNER "INCONSISTENT WITH THE SELLER'S OWNERSHIP," IN ACCORDANCE WITH § 2-606 (1)(C); APPELLANT WAS THEREBY PRECLUDED FROM REVOKING ITS ACCEPTANCE OF THE UNITS.

Facts: Parties entered into a contract whereby appellee would manufacture and deliver 5,000 x–ray cassette holders according to appellant's design, and upon appellant's approval of sample unit, for appellant to resell. Subsequent to this contract, appellant contracted with appellee for appellee to manufacture and deliver 195 holder units prior to the completion of the 5,000 units. Appellant accepted delivery of the 195 units, began to resell these units, but failed to pay appellee in full for the 195 units. Due to appellant's inconsistent payment for the 195 units, appellee sought adequate assurance of performance that appellant would remit payment for the 195 units, as well as the completed set of 5,000 units. During a telephone conversation, a corporate officer for appellant criticized appellee's product and stated he would not buy the "trashes" manufactured by appellee, which appellee interpreted as anticipatory repudiation. Appellant attempted to retract its repudiation through correspondence. Appellee filed a complaint in the Circuit Court for Montgomery County seeking payment for its work pursuant to the contracts, plus interest. Appellee counterclaimed alleging breach of contract and requesting damages.

Held: The court did not err in finding that appellant breached the initial contract for 5,000 units and appellant could not effectively retract its repudiation after appellee, not having received adequate assurance of appellant's performance, materially changed its position after appellant's repudiation, and sought payment of balances due. Neither did the court err, nor abuse its discretion in applying Commercial Law Article to find appellant accepted the units through its conduct of reselling the units. Appellant's complaint subsequent to acceptance was not sufficient to revoke its acceptance, nor were complaints adequate to prove appellant declared its disapproval of the sample unit. The court also

properly found that appellee was not in breach of contract, despite the creative financing arrangement, where appellant failed to remit payment due under contract for 195 units, and did not produce adequate assurance of performance regarding payment.

Rad Concepts, Inc. v. Wilks Precision Instrument Co., Inc. a/k/a Wilkes Precision Instrument Co., Inc., No. 478, September Term, 2005, decided February 2, 2006. Opinion by Davis, J.

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CONTRACTS – FORFEITURE CLAUSE – WHEN A CONTRACT GRANTS A LIFE ESTATE IN PROPERTY SUBJECT TO FORFEITURE IN THE EVENT OF A BREACH BY THE LIFE TENANTS, A COURT OF EQUITY CANNOT ENJOIN THE ENFORCEMENT OF THE FORFEITURE PROVISION, EVEN TO AVERT HARDSHIP, WHERE THE BREACH BY THE TENANTS WAS BOTH MATERIAL AND INTENTIONAL.

Facts: Kent County acquired ownership of Knock's Folly in 1974 and, in 1980, granted a conservation easement to the Maryland Historical Trust ("MHT"), a body corporate of Maryland's Department of Housing and Community Development ("DHCD"). The easement restricted the nature of the renovation and rehabilitation projects on the premises. Since 1990, Knock's Folly has been owned by the State of Maryland but is maintained under the care of the Department of Natural Resources ("DNR").

Per an agreement with DNR, Jon and Sally Mullen (the "Mullens") became curators of Knock's Folly. The curatorship agreement provided, inter alia, that the Mullens were permitted to live on Knock's Folly, rent and tax free, for the duration of their lives in exchange for donating their personal funds to restore and maintain the property. The agreement provided that any renovations to the property had to be approved by DNR and MHT. The agreement also provided that failure to comply with any or all of its terms permitted DNR to terminate the agreement and thus cancel the Mullens' right to live on the property.

Sometime between April and June 1999, the Mullens constructed a three-bay garage and ornate gates on the property without prior approval from the MHT or DNR. On February 9, 2001, DNR directed the Mullens to "raze and remove" the garage and to

simplify the gates, as the construction of those "improvements" was in violation of the agreement.

During the next eleven months, the parties were unable to resolve their differences concerning the "improvements," and on January 10, 2002, DNR wrote a letter to the Mullens notifying them that the agreement would be terminated if the unauthorized improvements were not cured within sixty days. The "raze and remove deadline" was extended until June 1, 2002. The DNR offered to resolve the matter on the condition that the Mullens either raze and remove the garage, or take off one bay and move the remaining structure to one of three alternative locations. The Mullens rejected the offer.

Litigation commenced between the Mullens and DNR (and others). After a bench trial, the trial judge resolved the dispute between the parties by making four major rulings, viz.:

1. That the deed of easement granted to the MHT was a valid legal restriction as a condition of the gift of Knock's Folly from the Kent County Commissioners to the DNR;

2. The Knock's Folly property was subject to the easement under the curatorship agreement between the Mullens and DNR;

3. The Mullens breached the terms of both the curatorship agreement and the easement when they built certain structures on Knock's Folly without the approval of either the DNR or the MHT; and

4. Despite their breach of the curatorship agreement, the MHT and DNR were enjoined from enforcing some, but not all, rights spelled out in the Agreement.

Held: Order granting injunctive relief to the Mullens reversed; all other judgments affirmed. The Court ruled:

(1) curators were not entitled to equitable relief from forfeiture clause in curatorship agreement;

(2) DNR and MHT were not equitably estopped from enforcing forfeiture clause;

(3) curators were not entitled, under the doctrine of substantial performance, to relief from forfeiture clause; and

(4) curators were not entitled, under the doctrine of unjust enrichment, to relief from forfeiture clause.

The Court said that, although in some instances equitable relief is appropriate to prevent a forfeiture, where a contract provides that forfeiture is the only remedy for a breach, a court of equity should not protect a party seeking equitable relief when the party willfully breached the contract.

Department of Housing and Community Development v. Jon Mullen, et ux., No. 1691, September Term, 2003, filed October 5, 2005. Opinion by Salmon, J.

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CRIMINAL LAW – DOUBLE JEOPARDY – DIAZ EXCEPTION – DOUBLE JEOPARDY WILL NOT BAR PROSECUTION OF A DEFENDANT FOR MANSLAUGHTER BY MOTOR VEHILCE WHEN DEFENDANT PAYS A CITATION FOR A LESSER-INCLUDED OFFENSE PRIOR TO VICTIM'S DYING.

Facts: On August 3, 2003, Carl Warne was issued a citation for negligent driving after being involved in a two-car motor vehicle accident. Warne paid the fine for the reckless driving citation on August 6, 2003, at 9:53 a.m., approximately seventeen hours before the other driver died in the hospital as a result of head and neck injuries sustained from the crash.

On February 5, 2004, an eleven-count indictment, which included automobile manslaughter and automobile homicide charges, was returned against Warne. Defense counsel filed a motion to dismiss. A new indictment was filed on July 15, 2004, correcting errors in the original indictment that served as grounds for dismissal.

A motions hearing was held on September 3, 2003. At that hearing, the State filed a nolle prosequi of all counts in the original indictment and the court dismissed counts seven through eleven (offenses under the Md. Code Ann. Trans. Art. s 21-902) as barred by res judicata. The court, however, denied Warne's motion to dismiss counts one through six on the ground of double jeopardy. Those counts were (1) manslaughter by vehicle or vessel; (2) homicide by motor vehicle or vessel while under the influence of alcohol; (3) homicide by motor vehicle or vessel while under the influence of alcohol or under the influence of alcohol per se; (4) homicide by motor vehilce or vessel while impaired by alcohol; (5) homicide by motor vehicle or vessel while impaired by drugs; and (6) homicide by motor vehicle or vessel while impaired by a controlled dangerous substance. Warne then filed an interlocutory appeal claiming that his constitutional rights (prohibiting the State from placing him in jeopardy for the same offense) had been violated.

Held: Judgment affirmed. Generally, successive prosecutions are barred by double jeopardy principles if the two offenses are the same under the Blockburger required-evidence test, as set forth in Blockburger v. State, 284 U.S. 299, 304 (1932). A lesser included offense is one which requires no proof beyond that which is required for

conviction of the greater offense. Under the Blockburger test, reckless driving is a lesser included offense of manslaughter by motor vehicle.

In this case, the ticket paid by Warne for negligent driving constituted a lesser offense for double jeopardy purposes, but the Diaz exception (Diaz v. U.S. 223 U.S., 442 (1912)), to the Blockburger test provides that double jeopardy is not a bar to a successive prosecution where the government at the time of the prosecution of the lesser offense was unable to proceed on the more serious charge because the additional facts necessary to sustain the more serious charges had not occurred or had not been discovered despite the exercise of due diligence. Applying the Diaz exception to the facts in this case, the Court reasoned that the State was unable to proceed on the manslaughter by motor vehicle charges at the time that Warne paid the traffic citation for negligent driving because at that point the victim had not yet died.

Warne argued, however, that the Diaz exception did not apply because the period of prosecution for the lesser offense did not end when he paid the ticket because, purportedly, he could have, within thirty days of his consent to a conviction, filed an appeal to the circuit court. According to Warne, the period of prosecution expired on September 2, 2004, twenty-nine days after the victim's death. The Court found no merit in this because Warne never filed an appeal and was in no sense being prosecuted for the lesser offense during the twenty-nine day period. The Court concluded that the State ceased to prosecute Warne for the reckless driving charge at the point Warne paid the fine and thereby consented to a conviction.

Carl Eugene Warne v State of Maryland, No. 2008, September Term, 2004, filed December 5, 2005. Opinion by Salmon, J.

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CRIMINAL LAW - NEWLY DISCOVERED EVIDENCE - IN FOCUSING ON DUE DILIGENCE PRONG OF RULE 4–31 (c), "NEWLY DISCOVERED EVIDENCE" - "EVIDENCE WHICH COULD NOT HAVE BEEN DISCOVERED BY DUE DILIGENCE"- TRIAL COURT PROPERLY DETERMINED THAT APPELLANT'S PRIOR REVELATIONS OF "COMMAND HALLUCINATIONS" ORDERING HIM TO ACT DEMONSTRATED MALINGERING AND HENCE THAT HIS CLAIM

THAT HIS MENTAL STATE CONSTITUTED NEWLY DISCOVERED EVIDENCE WAS NOT CREDIBLE.

Facts: At the first of two sentencing hearings, following his conviction for attempted first degree murder and other related charges, appellant had an emotional outburst, which required that he be retrained; the court continued the sentencing until a later date. Prior to receiving a sentence of life imprisonment for the attempted murder charge and five years imprisonment for the related charges, appellant filed a motion for a new trial based upon newly discovered evidence, that he suffered from several different mental disorders, including command hallucinations, which caused him to commit the crimes charged. Appellant had not revealed any of this information to his counsel prior to trial, during trial or during the ensuing seven months between his conviction and first sentencing hearing. The expert, testifying at the hearing on appellant's motion, believed appellant, in fact suffered from command hallucinations, and verified his findings based upon previous hospital records as well as letters, in the possession of appellant's then girlfriend, which discussed his hearing voices. The expert's report also revealed evidence of malingering on the part of appellant. The hearing court denied the motion finding that appellant's counsel had exercised due diligence because the evidence was exclusively within the mind of appellant at all times and counsel could not have been expected to know of the evidence unless appellant revealed it. The motion was denied because appellant did not exercise due diligence, i.e., he did not act reasonably and in good faith because he knew of this information at all times during the proceedings and failed to reveal it. Additionally, the trial court determined that the timing of appellant's revelation was suspicious, and the expert's testimony concerning appellant's malingering undermined his credibility.

Held: Affirmed. The court did not abuse its discretion by denying appellant's motion for a new trial. Appellant at all times knew of, but failed to reveal information concerning his mental state to his attorney. He did not act reasonably and in good faith by withholding the information. The timing of appellant's revelation, combined with the evidence of appellant's malingering and the fact that he had revealed his condition to others was persuasive evidence that appellant intentionally withheld information concerning his mental state.

Clarence J. Mack v. State of Maryland, No. 2181, September Term, 2004, decided January 31, 2006. Opinion by Davis, J.

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CRIMINAL LAW – SPEEDY TRIAL - HICKS DATE.

Facts: On August 2, 2002, an off-duty police officer, after hearing gunshots in the area of the Forest Creek Apartments in Prince George's County, observed a minivan traveling away from the Forest Creek apartment complex at a high rate of speed. The officer pursued the minivan, which crashed. Three men ran from the van. The officer chased the men on foot, but to no avail. A shotgun was found in the minivan, and a 9 mm handgun was recovered by the police a short distance from the location of the crash.

Approximately four hours after the crash, Prince George's County police officers responded to a report of a strange man leaving a backyard in a residential neighborhood close to the Forest Creek Apartments. The man was captured, and the police officer who had taken part in the earlier pursuit identified him (Wayne David Wheeler) as one of the three men who fled from the minivan.

As a result of the earlier shootings, one victim died, another was shot in the leg and survived, and a third was fired upon but escaped injury. Testing proved that the shotgun recovered from the van was the murder weapon and that the 9 mm handgun, found near the van, was also used in the shootings.

The State's theory of the case was that Wheeler was the getaway driver of the minivan but was not one of the shooters. Wheeler was indicted on September 5, 2002. His lawyer entered an appearance on September 23, 2002. The 180-day period for commencing trial set forth in Section 6-103 of the Criminal Procedure Article of the Maryland Code and Maryland Rule 4-271 expired on March 22, 2003.

A trial was set for March 3, 2003, but on February 27, the Prince George's County prosecutor notified defense counsel that the DNA tests of items found in the van did not link the defendant to the crime but that she nevertheless planned to ask for a continuance so that additional items from the minivan could be subjected to DNA testing. The trial judge denied the request for a continuance, stating that the prosecutor's reasons for a continuance did not constitute good cause. Rather than proceed to trial with insufficient evidence, the prosecutor nol prossed the indictment. After later DNA testing of a tee-shirt found on the floor under the steering wheel was linked with Wheeler, Wheeler was re-indicted for murder and related charges. The indictment occurred approximately four months after the original entry of the nol pros.

Wheeler filed a motion to dismiss the second indictment on the ground that the State had violated the Hicks Rule. The motion was denied. Following a jury trial, Wheeler was convicted of first-degree murder, second-degree murder, and the use of a handgun during the commission of a crime of violence. Wheeler appealed his conviction and contended, inter alia, that the State's nol pros of the first case violated his rights under the Hicks Rule.

Held: All convictions were reversed because the nol pros of the first indictment had the "necessary effect" of circumventing the Hicks Rule. The Court noted that, generally, when a criminal case has been nol prossed, and the same charges later re-filed, the 180-day period will be deemed to have commenced at the earliest of the arraignment

or the first appearance of defense counsel in the second prosecution. If, however, it is shown that the nol pros, had the "purpose" or "necessary effect" of circumventing the Hicks Rule, the 180-day period will be deemed to have commenced with the arraignment or first appearance of counsel under the earlier prosecution.

The prosecutor testified at the hearing on the motion to dismiss that when she nol prossed the charges it was not her intent to circumvent the 180-day rule because she thought, erroneously as it turned out, that the Hicks Rule would not be violated if she retried the defendant within nineteen days of the date the defendant was re-indicted. Nineteen days was the period between the date the case was nol prossed and March 22, 2003 – the date that the Hicks Rule expired under the first indictment. The prosecutor admitted that she could not have successfully prosecuted the defendant on any of the crimes with which he was charged on March 3, 2003, nor could she have received the results of the newly ordered DNA tests by the original Hicks date of March 22, 2003. Thus, the nol pros had the necessary effect of circumventing the Hicks Rule.

Wayne David Wheeler v. State of Maryland, No. 331, September Term, 2004, filed October 28, 2005. Opinion by Salmon, J.

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EVIDENCE - RELEVANCE - BALTIMORE CITY POLICE DEPARTMENT GENERAL ORDER 11-90; RICHARDSON v. MCGRIFF, 361 MD. 437 (2000); USE OF INTERNAL DEPARTMENTAL GUIDELINES TO ESTABLISH A STANDARD OF CARE WITHIN THE DEPARTMENT; APPELLANT'S RELIANCE ON RICHARDSON, WHICH WAS DECIDED ON THE BASIS OF THE RELEVANCY OF GENERAL ORDER, WAS UNFOUNDED; CIRCUIT COURT PROPERLY ADMITTED DEPARTMENTAL GENERAL ORDER TO ESTABLISH PROPER POLICE PROCEDURE IN CASE WHERE OFFICER, PROCEEDING TO THE SCENE OF A REPORTED STRUGGLE BETWEEN A SUSPECT AND ANOTHER OFFICER, ENTERED AN INTERSECTION CONTROLLED BY A TRAFFIC SIGNAL WHICH WITNESSES SAID WAS RED FOR THE OFFICER, STRIKING APPELLEE'S VEHICLE WITH HIS POLICE CRUISER.

Facts: Appellee was involved in a traffic accident with a Baltimore City Police officer, driving a police cruiser. The accident occurred at the intersection of Madison and Wolf Streets in Baltimore City, which is controlled by a traffic signal. The officer was

responding to an emergency at the time of the collision and according to the witnesses and appellee, the traffic signal controlling the direction of the officer was red. There was conflicting testimony from the witnesses as to whether the officer had both the emergency lights and siren activated prior to the collision, and only one witness testified that he briefly heard an intermittent siren. The officer testified that he responded to the emergency with both his lights and siren activated and slowed down before entering the intersection. He also testified that he entered the intersection believing that all vehicles, including appellee's vehicle, had yielded. Appellee introduced Baltimore City Police Department General Order 11–90, which required, inter alia, all police officers responding to an emergency to have both emergency lights and sirens activated and, when crossing against a traffic control signal, to bring the vehicle to a complete stop. The Mayor and City Council of Baltimore, appellants, sought to exclude General Order 11–90 from the trial. That motion was denied.

Held: Affirmed. The trial court did not err in admitting into evidence General Order 11–90. General Orders are promulgated pursuant to the authority granted to the Police Commissioner, incident to the management of the police department. General Orders are binding on all members of the department. General Order 11–90 was relevant to the issue of whether the officer acted reasonably in not bringing his patrol car to a complete stop prior to entering the intersection of Madison and Wolf Streets.

Mayor and City Council of Baltimore v. Michael Lee Hart, No. 403, September Term, 2005, decided February 2, 2006. Opinion by Davis, J.

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FAMILY LAW - CHILD IN NEED OF ASSISTANCE - C.J. § 3-819(e)

CIVIL PROCEDURE - MOOTNESS

Facts: A petition alleging Sophie S. to be a child in need of assistance (CINA) came on for hearing in the juvenile court on February 18, 2005. At the outset, counsel for the Department of Social Services advised the court that, inter alia, it intended to dismiss the petition as to Sophie, and to grant custody of Sophie to her non-custodial father. Thereafter, the hearing was taken up with proffers from counsel for all parties as to what might, or might not, be proved, and assertions of the wishes of their respective clients.

Without finding that the allegations against Sophie's mother had been sustained, the juvenile court dismissed the CINA petition and ordered Sophie to her father's custody.

Held: Judgment vacated. Where the juvenile court failed to find that the allegations had been sustained against the mother, its grant of custody to the father, after dismissing the CINA petition, constituted error.

Although In re Russell G., 108 Md. App. 366 (1996), and C.J. § 3-819(e), allow a juvenile court to award custody to a parent against whom allegations have not been sustained and, thereafter, dismiss the petition without making a CINA adjudication, the court must find and articulate that the allegations of the CINA petition have been sustained as to the other parent before doing so.

Even though the order of the juvenile court was rendered moot by a subsequent order of the equity court granting Sophie's custody to her father, the In re Russell G. and § 3-819(e) issues were addressed because of the likelihood of recurrence.

In re Sophie S., No. 0203, September Term, 2005, filed February 2, 2005. Opinion by Sharer, J.

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REAL PROPERTY - EASEMENT BY NECESSITY; MICHAEL v. NEEDHAM, 39 MD. APP. 271 (1978); DALTON v. REAL ESTATE AND IMPROVEMENT CO., 201 MD. 34 (1952); BECAUSE THERE WAS NO EVIDENCE THAT THE PARCELS OWNED BY APPELLANT AND APPELLEE, WERE DERIVED FROM A COMMON GRANTOR AND, BECAUSE THE NECESSITY ASSERTED - APPELLEE'S INABILITY TO ACCESS THE PARKING PAD AT THE REAR OF HER LOT - DID NOT EXIST THIRTY–FIVE YEARS AGO AT THE TIME OF THE INITIAL CONVEYANCE, TRIAL COURT ERRED IN GRANTING EASEMENT BY NECESSITY TO APPELLEE.

Facts: Appellant filed suit to quiet title to a 40' x 14' parcel of land, which shared a common border with the property of appellee. At the rear of appellee's property was a parking pad, which had been installed by appellee's predecessors in interest. The parking pad was only accessible by a macadam driveway, fully deeded to and on the property of appellant, which ran adjacent to appellee's property. Appellant's predecessors in interest granted appellee's predecessors permission to use the driveway to access the pad, but at some point constructed a fence which blocked all access to the parking pad from the driveway prior to the time the property was sold to appellee. After a full hearing on the

matter to quiet title, the trial court granted appellant's petition to quiet title, and at the same time granted appellee an implied easement by necessity to use appellant's driveway to access the parking pad. Appellant appealed the trial court's ruling that appellee had an implied easement by necessity to utilize the macadam driveway for ingress and egress to access the parking pad.

Held: Reversed. Trial court erred by granting appellee an implied easement by necessity over the property of appellant. There was no evidence produced by appellee to support a finding that the property of appellant and appellee were the product of a division of a unitary tract of land from a common grantor. Additionally, the necessity must arise at the time the unitary tract of land is divided. The evidence showed that appellant's predecessors owned the property from at least 1925, and the parking pad, creating the necessity, was constructed sometime in the 1960's. There was no evidence to support a finding, that the necessity, i.e., access to the parking pad existed, assuming arguendo there was a common grantor, thirty five years ago, at the time the property was conveyed to appellant's predecessors.

David Rau v. Brenda D. Collins, No. 653, September Term, 2005, decided February 2, 2006. Opinion by Davis, J.

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REAL PROPERTY - LEASES - LANDLORD AND TENANT – EXTENSIONS AND RENEWALS – OPTION TO EXTEND – CONDITIONS PRECEDENT.

CONTRACTS – CONSTRUCTION – AMBIGUITY

LANDLORD AND TENANT – EXTENSIONS AND RENEWALS – OPTION TO EXTEND – CONDITIONS PRECEDENT – EQUITY.

LANDLORD AND TENANT – DEFAULT.

Facts: In 1981, Chesapeake Bank of Maryland leased property to Kimmel Automotive, Inc. The lease provided for a term of twenty years, to expire on October 31, 2002, and included three successive options to extend upon ninety days' written notice. After Monro Muffler/Brake, Inc. purchased the lease from Kimmel, as a result of an administrative oversight, it attempted to exercise its option to extend by a letter dated August 29, 2002. The Bank refused to extend the lease because Monro's notice was untimely, and informed Monro that the lease had expired. Thereafter, Monro unsuccessfully attempted to exercise its option to purchase, and filed a petition for a

judgment of renewal of the lease in the circuit court. The court found in favor of Monro, and entered a judgment of renewal.

Held: Reversed. Generally, a landlord is not obligated to extend or renew a lease without an express covenant to that effect. Even with such a covenant, the landlord is not obligated to extend the lease if the tenant fails to satisfy a condition precedent to its option. The requirement of ninety days' written notice was a condition precedent to Monro's option to extend the lease.

The terms of the lease are not ambiguous. In giving untimely notice of extension, Monro failed to satisfy a condition precedent to its option to extend. The period during which Monro was negotiating its option to purchase was not a "then current extension" under the lease because Monro had failed to effectively extend the lease.

Earlier correspondence from Monro did not clearly manifest an intent to extend the lease, and therefore did not constitute notice of extension.

In this case, equity will not re-write the agreement of the parties merely because Monro's failure was the result of an administrative oversight, or based on the relative hardships to the parties. The Bank's failure to give Monro notice of the approaching deadline does not mandate an extension because a landlord is under no obligation to give such notice.

Pursuant to Md. Code (1974, 2002 Repl. Vol.) § 8-108(a), "[a] court may enter judgment for the renewal of a lease that contains a covenant for renewal," but the court is not required to do so where, as here, the tenant failed to satisfy a condition precedent.

Monro's failure to provide timely notice of extension was not a default that could be cured because it was not a violation of a term or provision of the lease. It was merely a failure to effectively extend the lease.

Chesapeake Bank of Maryland v. Monro Muffler/Brake, Inc., No. 2288, September Term, 2003, filed January 31, 2006. Opinion by Kenny, J.

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TORTS - DAMAGES - NEW TRIAL – REMITTITUR OF EXCESSIVE VERDICT.

Facts: Robert Whitelock was injured when he fell while exiting the ferris wheel at a carnival that was sponsored by the Hebron Volunteer Fire Department ("Hebron VFD"). After two surgeries on his left wrist and hand, and months of physical therapy, he still suffers from pain every day. Because he has very little strength in his hand, he is unable to participate in a variety of everyday activities and hobbies. He is, however, able to drive and carry on a small business.

A jury sitting in the Circuit Court for Wicomico County found Hebron VFD negligent, and awarded $15,000 for past medical expenses and $525,000 in non-economic damages.

The court granted Hebron VFD's motion for a new trial, unless Whitelock accepted a remittitur of $225,000, which he did.

Held: Affirmed. A trial court has broad discretion to determine whether a jury's damages award is so excessive that it warrants a new trial, and to give the plaintiff the alternative option of accepting a remittitur. The court did not abuse that discretion.

Hebron VFD preserved for appellate review the court's determination of the amount of remittitur by raising the general issue before the trial court, and because each party argued before the court the amount that it thought would constitute a proper verdict. Md. Rule 8-131(a).

In making its determination, the court stated that it had taken the jury's verdict into account and assessed the evidence in the case. Based on those considerations, the court obviously concluded that, whereas an award of $515,000 in non-economic damages is excessive, $300,000 is not.

Maryland Courts have given various descriptions of the trial court's power to grant a remittitur. The cases demonstrate that, as a natural corollary to its discretion to find that a verdict is excessive, a Maryland trial court has equally broad discretion in its determination of the amount of an appropriate remittitur. The determination of an appropriate amount is neither the product of a precise formula, nor a detailed checklist of considerations. Rather, the trial court, in making its determination, must make a fair and reasonable assessment of the evidence it has seen and heard during the trial and determine the highest amount that a reasonable jury would award to fairly compensate a plaintiff for his or her loss based on that evidence. The trial court does not make an independent determination of what it would have awarded had it been the fact finder. Instead, it only determines the amount at which it finds the award no longer excessive.

Hebron Volunteer Fire Department, Inc. v. Robert N. Whitelock, No. 2047, September Term, 2004, filed January 30, 2006. Opinion by Kenney, J.

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TORTS - NEGLIGENCE – PERSONAL INJURY – INCONSISTENT VERDICTS.

Facts: On March 20, 2000, Paul Syphax was driving in rush-hour traffic in Silver Spring when his car collided with the rear end of Dan Patras's vehicle. Patras later sued Syphax for damages that he claimed resulted from the accident.

While Syphax testified that the impact was a mere "tap" that caused no damage to either vehicle, Patras testified that the collision was "forceful," caused him to momentarily lose consciousness, and bent the back of the trunk of the car he drove. After the accident, Patras was treated at a hospital emergency room. He completed a course of physical therapy for a strained neck and back. A list of medical expenses totaling $11,832.60 was introduced into evidence.

At trial, Syphax admitted that he followed Patras's car too closely but offered evidence to show that Patras exaggerated his injuries from the accident "possibly to obtain compensation for non-existent injuries or pre-existing" ones. Syphax's expert, a medical doctor, testified that although Patras did suffer some physical injuries from the collision he believed that much of Patras's treatment was unnecessary.

Syphax presented evidence that Patras, 69, suffered from degenerative arthritis prior to the accident. Defense counsel also challenged whether Patras's injuries were actually caused by the collision. Syphax's counsel argued that Patras had lied about having had no pre-accident injuries or complaints and supported that argument by introducing emergency room records from 1995 showing that Patras had complained of the same symptoms previously.

On the verdict sheet, the jury indicated that Patras had established by a preponderance of the evidence that Syphax's negligence was the proximate cause of the accident and Patras's injuries. Nevertheless, the jury awarded Patras no damages. Patras filed a timely motion for a new trial as to damages only, arguing that the verdict was a miscarriage of justice, legally inadequate, and against the weight of the evidence. The trial court denied his motion, and he timely appealed.

Held: Judgment affirmed. Though irreconcilably inconsistent verdicts in a civil case cannot stand, the jury's zero-sum damage award can be reconciled with its causation

findings. The jury could have found that, although Patras sustained some injury in the accident, he "failed to meet his burden of proof in showing the amount that would compensate him for his injury as to any particular item of damage." In the Court's view, a reasonable juror could have believed, in conformity with the court's instructions, that Patras experienced some minor pain from the accident but had no legitimate medical expenses, warranting zero damages. Nothing in the record rebuts the presumption that the jurors understood and followed the court's instructions. Moreover, no jury instruction required the jury to award damages if it found that Patras failed to meet his burden of proof in establishing damages.

The Court also said that the zero-damage award was not inconsistent with uncontroverted evidence because Syphax controverted the issue of whether any injury was sustained by casting doubt on Patras's veracity concerning the medical history relayed to his treating physician and to the medical doctor called by the defense, citing Edsall v. Huffaker, 159 Md. 337 (2004), where the Court upheld a zero-damages award even though the defendant failed to present evidence to contradict causation testimony by the plaintiff's expert, which supports the holding here.

Dan Patras v. Christopher Paul Syphax, No. 1532, September Term, 2004. Opinion filed on December 2, 2005 by Salmon, J.

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# ATTORNEY DISCIPLINE

By an Order of the Court of Appeals of Maryland dated February 2, 2006, the following attorney has been indefinitely suspended by consent, effective immediately, from the further practice of law in this State:

MATTHEW G. DOBSON

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By a Per Curiam Order of the Court of Appeals of Maryland dated February 3, 2006, the following attorney has been disbarred, effective immediately, from the further practice of law in this State:

ERIC JAG KAPOOK

*

By an Order of the Court of Appeals of Maryland dated February 3, 2006, the following attorney has been suspended by consent for thirty (30) days, effective immediately, from the further practice of law in this State:

STEPHEN F. MARSALEK

*

By and Opinion and Order of the Court of Appeals of Maryland dated February 7, 2006, the following attorney has been disbarred from the further practice of law in this State:

JOSEPH M. GUIDA

*

By an Opinion and Order of the Court of Appeals of Maryland dated February 8, 2006, the following attorney has been indefinitely suspended from the further practice of law in this State:

SHUAN H.M. ROSE

*

By an Opinion and Order of the Court of Appeals of Maryland dated February 10, 2006, the following attorney has been indefinitely suspended from the further practice of law in this State:

RICHARD J. REINHARDT

*

By an Order of the Court of Appeals of Maryland dated February 24, 2006, the following attorney has been disbarred by consent from the further practice of law in this State:

PETER DRISCOLL

*

# JUDICIAL APPOINTMENTS

On December 22, 2005, the Governor announced the appointment of SIDNEY S. CAMPEN, JR. to the Circuit Court for Talbot County. Judge Campen was sworn in on January 27, 2006 and fills to vacancy created by the retirement of the Hon. William S. Horne.

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On December 22, 2005, the Governor announced the appointment of the HON. KENNETH LONG to the Circuit Court for Washington County. Judge Long was sworn in on February 3, 2006 and fills the position created in the 2005 Session of the General Assembly.

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On December 22, 2005, the Governor announced the appointment of ROBERT B. KERSHAW to the Circuit Court for Baltimore City. Judge Kershaw was sworn in on February 6, 2006 and fills the vacancy created by the retirement of the Hon. Paul A. Smith.

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On January 4, 2006, the Governor announced the appointment of DEVY PATTERSON RUSSELL to the District Court for Baltimore City. Judge Russell was sworn in on February 10, 2006 and fills the position created in the 2005 Session of the General Assembly.

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